

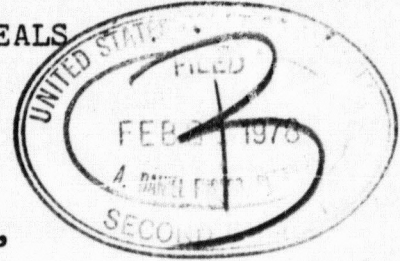
***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6215

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



PIERCE & STEVENS CHEMICAL CORP.,

Plaintiff-Appellee,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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I N D E X

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PLAINTIFFS
PIERCE & STEVENS CHEMICAL CORP.

DEFENDANTS
U.S. CONSUMER PRODUCT SAFETY
COMMISSION

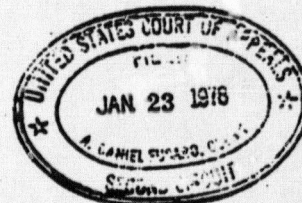
CAUSE Action for injunction for violation
of the Consumer Product Safety Act
(15 U.S.C. §2051 et seq.) and the Freedom
of Information Act (5 U.S.C. §552)

pah

ATTORNEYS

William L. Rieth, Esq.
Phillips, Lytle, Hitchcock, Blaine
& Huber
3400 One Marine Midland Center
Buffalo, New York 14203
847-8400

United States Attorney
(Williams)



77-6215

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UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

/ A

Civ-75-10 Pierce & Stevens Chemical Corp. v. U.S. Consumer Product Safety Comm.

DATE	FILE	PROCEEDINGS
1975		
Oct. 2	2	Filed complaint.
	2	" order to show cause why an order should not be made F-169, granting a preliminary injunction etc. ret. 10-10-75 at 12:00pm-Elvin, DJ
	2	JS 5 made
	16	Filed Mar. ret. on S&C served on Edward H. Levi by cert. mail on 10-6-75 & U. S. Consumer Product Safety Comm by cert. mail on 10-7-75
Nov. 13		" Defts. motion to dismiss
	13	" Defts. opposition to order to show cause & Pltfs. request for preliminary injunction.
	18	Motion adj. to 12-8-75 adj. to 1-5-76
Dec. 19		Filed Pltfs. affidavit in support of injunction.
	1976	
Jan. 5		Motion adj. to 1-19-76
	26	after argument on both motions, submitted.
Feb. 23		Filed Deft's. response to Pltff's supplementary memo supporting injunction
	1977	
Oct. 26		Filed Order that CPSC's motion to dismiss or in the alternative for summary judgment is denied, etc. ELVIN. DJ Notice F-193 & cy to Roger Williams and William L. Rieth.
		" Deft's. Notice of Appeal (copy mailed to Mr. Rieth and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to U.S. Attorney) -
	1978	
Jan. 12		Filed transcript of proceedings of 1-26-76.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PIERCE & STEVENS CHEMICAL CORP.

CIV - 75 - 410

Plaintiff,

vs.

COMPLAINT

U. S. CONSUMER PRODUCT SAFETY COMMISSION

Defendant.

Plaintiff, by its attorneys Phillips, Lytle, Hitchcock, Blaine & Huber, alleges for its complaint against the defendant herein:

1. Jurisdiction of this action is had under sections 1337, 1346, and 1361 of title 28 of the United States Code.

2. Plaintiff is a corporation incorporated under the laws of the State of New York, having its principal place of business in Buffalo, New York.

3. U. S. Consumer Product Safety Commission (the "Commission"), the defendant herein, is an agency of the United States of America and maintains an office within the Western District of New York.

4. This action involves the likely imminent violation by the Commission of provisions of the Consumer Product Safety Act, U.S.C., Title 15, §2051 et seq. and of the Freedom of Information Act, U.S.C., Title 5, §552, as hereinafter more fully appears.

5. On April 25, 1975, plaintiff received a letter dated April 22, 1975 from the Commission (a copy of said letter, without its attachments, is attached hereto as Exhibit A) requesting plaintiff to examine three certain Food and Drug Administration documents (the "Documents") with respect to their possible exemption by law from public disclosure.

6. The Documents contain grossly false, inaccurate, misleading, and prejudicial statements relating to plaintiff and its products, as well as confidential and trade secret information relating to plaintiff and its products.

7. Plaintiff duly responded to Exhibit A by its letter dated May 5, 1975 (a copy of said letter is attached as Exhibit B).

8. The Commission responded to Exhibit B by letter dated June 12, 1975, received June 19, 1975 (a copy of said letter is attached hereto, without its attachments, as Exhibit C).

9. Prior to its issuance of Exhibit C the Commission failed to take reasonable steps to assure, as required by §6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. §2055(b)(1), that the information in the Documents, from which the identity of plaintiff herein could be readily ascertained, was accurate and was fair in circumstances and was reasonably related to effectuating the purposes of the Consumer Product Safety Act.

10. By letter dated June 24, 1975 (a copy of said letter is attached hereto as Exhibit D) plaintiff answered Exhibit C.

11. By letter dated September 18, 1975 and received September 23, 1975 (a copy of said letter, without its attachments, is attached hereto as Exhibit E) the Commission again threatened to publicly disclose the Documents.

12. The Commission has wholly failed, in violation of law, to take reasonable steps to ascertain the accuracy, fairness or propriety of the disclosure of the Documents.

13. Disclosure of the Documents would be improper, illegal and unjust because they contain false, inaccurate and misleading statements.

14. Disclosure of the Documents would be improper, illegal and unjust because such disclosure would be grossly unfair and prejudicial to plaintiff in the circumstances.

15. Disclosure of the Documents would be improper, illegal and unjust because such disclosure is not reasonably related to effectuating the purposes of the Consumer Product Safety Act.

16. Disclosure of the Documents is likely to result in substantial, immediate and irreparable damage to plaintiff by defaming of plaintiff and its products and by subjecting plaintiff to unnecessary, baseless, harassing and costly litigation.

17. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays for a judgment permanently enjoining the Commission and its agents and employees from disclosing the information in the Documents, and for such other and further relief as to this Court shall seem just.

PHILLIPS, LYTTLE, HITCHCOCK, BLAINE & HUBER

By: William L. Pieth
Member of the Firm

Attorneys for Plaintiff
Office and Post Office Address
Suite 3400, One Marine Midland Center
Buffalo, New York 14203
Tel. No. 847-8400

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

April 22, 1975

APR 25 1975

Henry E. Jones, President
Pierce & Stevens Chemical Corporation
P. O. Box 1092
Buffalo, New York 14240

Dear Mr. Jones:

The Consumer Product Safety Commission has received a Freedom of Information request for a copy of a plant inspection report of your firm prepared by Commission staff. Please review the enclosed report to determine whether any of the information contained therein should be considered confidential "trade secret or commercial information" entitled to exemption from disclosure under section 552(b)(4) of the Freedom of Information Act, 5 U.S.C. 552.

If you decide to submit a claim of confidentiality, please specify the following with respect to the specific claims:

1. the exact portion(s) of the information claimed to be confidential by separating it out from the entire body of information requested;
2. whether the information claimed to be confidential has ever been released in any manner to persons outside the company's employ;
3. whether the information is of a type that is generally known within the industry;
4. precisely how disclosure of the information is likely to pose a substantial threat to your company's competitive position;
5. the amount of effort or money expended in developing the information;
6. the degree of difficulty with which the information could be properly acquired or duplicated by others; and
7. the identity and position of the person authorized to make claims of confidentiality on the company's behalf.

Please note that broadly-expressed claims which lack specific support will be considered nonresponsive and therefore insufficient to sustain a claim of confidentiality. Failure to submit a claim of confidentiality received by the Commission within 5 working days of receipt of this letter

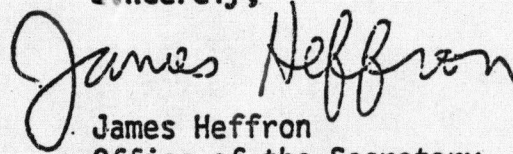
EXHIBIT A

Henry E. Jones
April 22, 1975
Page 2

will be considered an acknowledgement that the information is not of a confidential nature.

The Secretary of the Commission will rule on the validity of all claims of confidentiality in accordance with the most authoritative judicial interpretations available under the Freedom of Information Act. You will be informed of the Secretary's determination at least 10 days prior to any public disclosure of information for which a claim of confidentiality has been made.

Sincerely,

A handwritten signature in cursive script that reads "James Heffron". The signature is written in dark ink and is positioned above the typed name and title.

James Heffron
Office of the Secretary

Enclosure

8

May 5, 1975

Mr. James Heffron
Office of Secretary
U. S. Consumer Products
Safety Commission
Washington, D. C. 20027

Re: Pierce & Stevens Chemical Corp.

Dear Mr. Heffron:

As we advised in our telephone conversation on Tuesday, April 29, we are attorneys for Pierce & Stevens Chemical Corp. ("P&S"). As such we are replying to your letter of April 22, 1975 respecting the possible disclosure by the Consumer Products Safety Commission (the "Commission") of three documents (the "Documents"), copies of which you enclosed as follows:

(i) An Establishment Inspection Report ("EIR") of 25 single-spaced pages, together with a one-page Endorsement attached relating to an FDA inspection of P&S apparently conducted on or about November 12 and 13, 1969;

(ii) a copy of a two-page, single-spaced letter dated November 28, 1969 to P&S from Raymond L. Sweeney of the Buffalo District Office of FDA;

(iii) an EIR consisting of 17 single-spaced pages, together with a one-page Endorsement attached, relating to an FDA inspection of P&S apparently conducted on or about October 20, 1970.

In our call we timely requested an extension of time to respond because of (i) the age of the materials involved; (ii) the temporary unavailability of knowledgeable P&S personnel; (iii) the 30 day period provided for appropriate disclosures under the Consumer Product Safety Act (the CPS Act); (iv) the unavailability to us of the proposed Commission regulation entitled "Policies and Procedures Regarding Information Disclosure and Commission Employee Testimony in Private Litigation" (a copy of which you then promised to send

EXHIBIT B

May 5, 1975

promptly but which we have not yet received); and (v) the voluminous work required to respond appropriately to your letter. Unfortunately the Commission granted only an inadequate one-day extension of time to respond.

Your letter alluded to one of the several valid bases for such non-disclosure here, the privileged or confidential nature of the Documents under the Information Act, Section 552(b)(4) of U. S. Code Title 5.

In fact, the Information Act contains three applicable provisions, each of which mandates non-disclosure here. Those three provisions form three separate and independent bases for our objections to disclosure:

First, the Act's Exemption 3 (Section 552(b)(3)) exempts information protected by the provisions of other statutes, including, of course, the Consumer Product Safety Act (15 U.S.C. 562051 et seq.), the provisions which mandate non-disclosure here - see Part I below.

Second, much of the information is confidential, privileged or trade secret information and is precluded from disclosure by the Act's Exemption 4 (Section 552(b)(4)) - see Part II below.

Third, the Documents involve intra-agency memoranda and are precluded from disclosure by the Act's Exemption 5 (Section 552(b)(5)) - see Part III below.

I. THE CONSUMER PRODUCT SAFETY ACT BARS THE DISCLOSURE OF ANY OF THE DOCUMENTS.

1. The CPS Act requires the Commission to ascertain, before information is disclosed, that it is accurate, not misleading, not unfair and will further the Act's purposes. The CPS Act (Section 6(a)(1); 15 USC 2055(a)(1)) makes clear that nothing in that Act requires the release of any information which either is exempted by Section 552(b) of the Information Act or is otherwise protected by law from disclosure.

Section 6(b)(1) of the CPS Act imposes on the Commission the affirmative duties to take "reasonable steps to assure, prior to its public disclosure thereof, that [the] information ... is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Chapter." To underscore the importance of those affirmative duties, that section further imposes on the Commission the duty

May 5, 1975

of retracting any inadvertent disclosure of "inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer..." The House Committee Report (92-1153, p.32) made clear the affirmative duty imposed on the Commission to make a prior determination that the information it may disclose is truthful and accurate. The Committee recognizes that the Commission has a responsibility to assure that the information which it disseminates is truthful and accurate."

2. The Documents contain inaccurate and misleading information prejudicially reflecting on the safety of P&S products, and their disclosure would be grossly unfair and will not further the purposes of the CPS Act.

(a) The Documents contain highly prejudicial and erroneous misleading information. The Documents contain significant erroneous and misleading statements which are to the substantial detriment of P&S. One notorious example of such prejudicial error is illustrative. The Documents contain innumerable erroneous tentative conclusions respecting supposedly improper labelling by P&S, required by the provisions of Section 191.7 CFR (now 16 CFR Section 1500.14). The apparent error of those tentative conclusions is finally acknowledged in a "Report Addendum" on the last page of the 1970 EIR, which notes P&S's exemption under Section 191.63 CFR (now 1500.83) from such labelling requirements:

"Label comments on this firm's products appearing in this report were made prior to the finding that many of this firm's products may be exempt for portions of the label requirements under 191.63 (a) (13)." (Emphasis added)

Another example of a highly prejudicial error is a repeated reference in the Documents to a death anonymously "alleged to have been caused by" a P&S product. In fact, there is no valid basis for that anonymous hearsay. Even today, 6 years after the supposed death, P&S has never had any claim or threat of claim respecting that alleged death. The fact that no claim or threat of claim has reached P&S concerning any such death persuasively indicates that the anonymous hearsay was false and that no such death was caused by any P&S product. That false gossip should not be spread further.

Other examples of the errors, hearsay, tentativeness, speculativeness, uncertainty and misleading comments in the Documents are set forth in the Appendix to Part I, to which your attention is respectfully addressed.

//

May 5, 1975

(b) The Commission has made no apparent effort, as required by the CPS Act, to determine whether the information set forth in the Documents is accurate, truthful and not misleading or that disclosure would be fair or that disclosure would further the Act's purposes. Since the Documents are demonstrably riddled with error and preliminary opinion, the release of the Documents would clearly be violative of the strictures of the Act.

(c) Disclosure will not promote justice but is likely to foment baseless and exceedingly expensive litigation against P&S. Apparently the person seeking the Documents is an attorney trying to shore up some possible claim against P&S. Since the courts provide discovery procedures which are appropriate, adequate and tested for proper discovery of relevant information by litigants, a task for which the Commission is not equipped, the Commission should withhold disclosure of the Documents. As the Supreme Court re-emphasized last Monday in NLRB et al. vs. Sears Roebuck & Co., 43 LW 4491, 4495 "The [FOI] Act is fundamentally designed to inform the public about agency action and not to benefit private litigants." EPA v. Mink 410 U.S. 73, 79, 92; Renegotiation Board v. Bannerkraft 415 U.S. 1, 24." (Emphasis added).

(d) Despite the errors, the hearsay, the hypotheses and the preliminariness of opinions in the Documents, the Documents, if disclosed, may possibly be held, to the unfair prejudice of P&S, to constitute admissible evidence in some court. As "official government documents" some court may allow them as some evidence of supposed wrongful action by P&S. Furthermore, if disclosed by the Commission and used in litigation, it can be anticipated that the Documents will surface in an unending chain of other litigation. The unfair prejudice to P&S of disclosure of the erroneous and misleading information in the Documents can thus be literally limitless.

(e) The preliminary nature of the tentative conclusions in the Documents render the Documents inherently misleading. On last Monday, April 28, 1975, the Supreme Court of the United States rendered its decisions in two Information Act cases, NLRB et al vs. Sears Roebuck & Co. (the Sears case) and Renegotiation Board vs. Grumann Aircraft Engineering Corporation (the Grumann case). In both these cases the court noted the wisdom of not disclosing preliminary agency thought processes, recommendations, and tentative conclusions. (See Part III hereof) Since the documents here reflect tentative opinions subject to change their release can be inherently misleading. This is particularly true when the Documents, after 40-odd pages, concede

May 5, 1975

a basic flaw in the entire approach reflected by the Documents, and yet nothing was done to revise the Documents in light of that error. The Documents are thus patently misleading.

(f) The information in the Documents is stale. The most current information in the Documents is almost 5 years old and some of it relates to data more than 10 years old. Even to the extent that the information in the Documents was accurate when written, much of that information is no longer accurate or true and hence its disclosure now would be both misleading and unfair.

Because of their staleness, the Documents cannot significantly advance consumer product safety in 1975. Their disclosure cannot be deemed to further the four purposes stated in the CPS Act.

(g) The Documents are so inextricably engrained with and predicated upon prejudicial error, misleading hearsay, hypotheses and unsupported preliminary opinions that discovery should be denied to the Documents. Because of the various errors, preliminary recommendations and tentative conclusions which are so thoroughly integrated into the text of the Documents, the Documents are inextricably and inseparably permeated with such errors and hypotheses.

In view of the inaccurate, unfair, misleading and tentative nature of the comments contained in the Documents, no part thereof should be disclosed by the Commission.

II. MUCH OF THE INFORMATION CONTAINED IN THE DOCUMENTS INVOLVES CONFIDENTIAL, PRIVILEGED OR TRADE SECRET INFORMATION, DISCLOSURE OF WHICH IS BARRED BY EXEMPTION 4 AND BY 18 U.S.C. §1905.

The Documents contain several different types of confidential, privileged or trade secret information, the disclosure of which is barred by the Act's Exemption 4 (Section 552(b)(4)). A detailed line-by-line reference to those matters set forth in the Documents which are clearly privileged, confidential or trade secrets and thus exempt from disclosure is set forth in the Appendix to Part II hereof to which your attention is directed. Examples of such undisclosable confidential information in the Documents are:

(i) P&S's financial information, such as the dollar amounts noted on FD form 481;

(ii) information concerning P&S's raw material and product formulae, and changes therein, such as that set

May 5, 1975

forth on pages 4 through 7 of the 1969 EIR;

(iii) information describing P&S's manufacturing equipment and processes, such as that set forth on page 7 of the 1969 EIR;

(iv) information concerning P&S's customers and prices, such as the invoices referred to on pages 24 and 25 of the 1969 EIR; and

(v) information concerning P&S's bargaining positions, vis-a-vis the FDA's interpretation as to labelling requirements, such as set forth at page 3 of the 1970 EIR.

These types of information are the very types of information which the Information Act was intended to preclude from disclosure. None of it would be customarily released to the public by P&S. As made clear in the House Report (HR Rep.10) in discussing the Act's Exemption 4: "The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or development and negotiation positions or requirements ... it would also include information which is given to an agency in confidence, since a citizen should be able to confide in his government." To the same effect is the Senate Report (S Rep.9).*

As stated in Benson vs. G.S.A., 239 F.Supp. 590, 594 (W.D. Wash. 1968) affd. 415 F.2d 878 (9th Cir. 1969):the exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential." A number of Federal agencies have exempted from disclosure any information received under an express or implied understanding that the information will remain confidential. See, for example, Air Force Regulations at 32 CFR 806.5(d) (1974), which exempts from disclosure documents "containing information the Government has received from anyone, including ... a corporation ... with the understanding, expressed or

*The Senate Report states: "This exception is necessary to protect the confidentiality of information which is obtained by the government through questionnaires or other inquiries, but would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists and manufacturing processes."

May 5, 1975

implied, that the information will be retained on a privileged or confidential basis..." Of similar broad scope is the Commission on Civil Rights which ordinarily exempts from disclosure confidential communications including those "alleging, or supporting an allegation of, the commission of wrongs by certain persons or entities" (43 CFR §704.1(f)(2)(1974)).

Finally, the prohibition in the Federal Criminal Code (18 U.S.C. §1905) against the unauthorized disclosure of trade secrets and other confidential information, leaves no doubt that the privacy of the Documents here must be protected.

In response to paragraph 1 of your letter we have set forth, in the Appendix to Part II, those parts of the Documents barred from disclosure as confidential, privileged or trade secret information. Your letter also seeks, in its paragraphs 2-7, a wealth of other information which P&S was unable to fully locate and compile in the brief time given. While we do not agree with the propriety of your added requests, we nonetheless shall attempt to briefly respond to those six added requests.

As to paragraph 2, the confidential, privileged or trade secret information designated in the Appendix to Part II has not been released to persons outside P&S's employ except to persons, such as P&S's counsel and the FDA, to whom such information was both given and received as a confidential and privileged communication.

As to your paragraph 3, the information designated in the Appendix to Part II is not, so far as known to P&S, generally known within the industry.

As to your paragraph 4, it is impossible to foresee all the disastrous consequences to P&S that the unjustified disclosure of such information would cause to its competitive position, as well as to its defense against baseless and unfounded litigation claims. Disclosure of such information would result in, among other direful effects to P&S, other persons duplicating P&S's products using P&S's own secret formulae and production methods, thereby causing substantial and irremediable losses to its business and revenues.

As to your paragraph 5, it is impossible to quickly ascertain either the man hours of effort or the total dollars expended over the long period of years to develop that confidential information, but one can fairly say that the aggregate

May 5, 1975

cost of the necessary research, development, market testing and improvements of the various product formulae alone involved is much in excess of \$1,000,000.

As to your paragraph 6, it would be virtually impossible, to the best information of P&S, for any person to "properly" acquire or duplicate that confidential information. While P&S's products are subject to possible physical and chemical analysis to some limited extent, such analysis would not, it is believed, permit duplication of the secret formulae.

As to your paragraph 7, the persons authorized to claim confidentiality on P&S's behalf include its President, Henry E. Jones, as well as its attorneys and its other authorized officials and representatives.

III. THE DOCUMENTS ARE PREDECISIONAL INTRA-AGENCY MEMOS AND ARE PROTECTED FROM DISCLOSURE.

The Documents are protected by the Act's Exemption 5 (Section 552(b)(5)) which exempts from disclosure "inter-agency or intra-agency memorandums or letters." There is no doubt that the two EIRs are "intra-agency memorandums" passing between field officials of the FDA. Nor is there any doubt that the Documents are not "final opinions" within the meaning of Section 552(a)(2)(A) since the Supreme Court has just held in the Sears case that even agency memos which explain decisions directing an agency "to file a complaint and commence litigation ... are not 'final opinions'." Nor should there be any doubt the Documents here would not "routinely be distributed" to private litigants (see footnote 16 in the Sears case). The Documents here consist of much more than "purely factual material." Environmental Protection Agency v. Mink, 410 U.S. 92, 93 S. Ct. 827, 35 L.Ed. 2d 110 (1973). They are inseparably filled with the subjective conclusions and suggestions, express and implied, relating to the supposed labelling violations. The Documents are laced with tentative conclusions and recommendations, many of which are belatedly recognized by the reporter to be apparently erroneous.

In discussing Exemption 5, the U. S. Supreme Court in the Sears case noted that, because of the necessity to protect the decision-making processes of government agencies, the law exempts from disclosure predecisional documents which reflect advisory opinions, recommendations and deliberations. It agreed with Professor Davis' observation that Exemption 5 calls for "the withholding of all papers which reflect the agency's group

May 5, 1975

thinking in the process of working out its policy and determining what its law ought to be."

A clear warning was voiced by the Court in the Sears case both to the lower Courts and to the agencies to be wary of interfering with this process. In a footnote the Court underscored the need to protect such predecisional documents:

"Our emphasis on the need to protect predecisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." footnote 18 (Emphasis added).

In the companion Grumann case the Court held that reports prepared prior to final agency action and used by the agency in its deliberations were exempted from disclosure by Exemption 5, stating:

"... both Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure and post-decisional memoranda setting forth the reasons for an agency decision already made, which are not [exempt]."

In Grumann the Court noted that regional agency bodies, like the FDA representatives filing the tentative reports here, "simply in no sense ... have the power to make 'final dispositions' and thus no sense in which explanations of their recommendations can be characterized as 'final opinions'."

Reasons specifically cited by the Court in Grumann for exempting the preliminary sort of reports involved in the Documents here included the real possibility that the person "who wrote the report may change his mind" or "may have included thoughts in the report with which he was not in

May 5, 1975

agreement at the time he wrote it." The "Report Addendum" to the 1970 EIR clearly shows a change of mind by the reporter respecting both the 1969 and the 1970 EIRs. Furthermore, as appears in the Appendix to Part I heretofore, the persons who wrote the reports here included many thoughts and observations about which they were uncertain. The Documents are therefore clearly exempt documents and should not be disclosed.

As demonstrated above, basic fairness dictates non-disclosure of the Documents. If you desire further information in connection with this matter, please let me know promptly by telephone.

Incidentally, since the matters discussed herein are inherently privileged and confidential in nature, this letter and its appendices are also not to be disclosed to persons outside the Commission.

Very truly yours,

PHILLIPS, LITTLE, HITCHCOCK, BLAINE & HUBER

By

William L. Rieth

Bhl
Encs.

cc: Mr. Henry E. Jones
Mr. R. E. Shanahan

APPENDIX TO PART I

THE FOLLOWING EXCERPTS ARE ILLUSTRATIVE OF THE
MISLEADING, ERRONEOUS, HYPOTHETICAL, SPECULATIVE
AND HEARSAY STATEMENTS WHICH ABOUND IN THE DOCUMENTS

1969 Endorsement

- Paragraph 1 "This inspection was made as a follow-up to the death of a 13 year old girl in Michigan. The fatality was alleged to have been caused by a flash fire involving . . ."
- Paragraph 3 " . . . the full cautionary labeling recommended for . . . " (the labeling was not law until May 1970)

Letter of November 28, 1969

- Page 1, Paragraph 3 "If the article has other hazards, . . ."

1969 Reports

- Page 2, Paragraph 1 "This inspection was a follow-up to a child's death reported by Detroit District. The death was attributed to burns caused by a flash-fire . . ."
- Paragraph 2 " . . . suggested by DCG to Detroit District . . . " (the suggestions were not law until May 1970) " . . . suggested labeling."
- Page 3, Paragraph 1 " . . . supposedly for industrial use only." "Some of the coatings may be indirect food additives."
- Page 4, Paragraph 4 " . . . products which may present a hazard .
- Page 8, Paragraph 2 " . . . statements suggested by the Adhesive & Sealants Council." (the suggestions were not law until May 1970) "This precautionary information may not be effective, and is not the same as suggested .

Last Paragraph "This product apparently does contain Toluene. If this solvent is present . . ."

Page 9, Paragraph 1 "The product may contain . . ."
" . . . there may be a hazard. . ."
" . . . suggested cautionary labeling . . ."

Paragraph 2 "The signal word and statement of hazard appear to be . . ."
" . . . but does not appear to be smaller than 6 point type."
"It appears that . . ."

Page 10, Paragraph 3 " . . . information suggested by the Adhesives & Sealants Council . . ." (the suggestions were not law until May 1970)

Paragraph 5 "The product may contain Toluene and if it is present . . ."

Paragraph 6 "The product may also contain . . ."

Page 11, Paragraph 4 ". . . I converted the viscosity to Centistokes and found it to be approximately 850,000 Centistoke units." (This number is an obvious error)
" . . . labeling suggested by Adhesives and Sealants Council." (the suggestions were not law until May 1970)

Paragraph 5 "This product also may contain . . ."
" . . . products containing Methyl Ethyl Ketone should bear . . ." (no such requirement was then applicable)
"This may not be a significant hazard with this product due to its viscosity."

Page 12, Paragraph 1 "Apparently room can be found if . . ."

Last Paragraph "The cautionary statements regarding the products flammable nature appear . . ."

Page 13, Paragraph 2 " . . . information appears to be . . ."

Page 14, Paragraph 1 "The product may contain . . ."

Paragraph 3 " . . . appear to be . . . "

Page 15, Paragraph 2 "If this product contains . . . "

Paragraph 3 " . . . Isopropanol which may be an eye irritant . . . "

" . . . as suggested by the Administration."

Paragraph 4 " . . . appear to be . . . "

Paragraph 7 " . . . appear to be . . . "

Page 16, Paragraph 2 " . . . appears to be . . . "

Paragraph 3 "Apparently, a larger type could be used if required . . . "

" . . . appears to be . . . "

Page 17, Paragraph 2 " . . . appears to be . . . "

Paragraph 5 " . . . appears to be . . . "

Page 18, Paragraph 3 "The signal word on the rear panel appeared to in less than 18 point type. It also appears that some of the other cautionary information . . . appears in less than 6 point type."

Page 19, Paragraph 4 " . . . the product may contain . . . "

Paragraph 5 "Due to this product's viscosity, it may qualify for an exemption under Section 191.63(13)."

Last Paragraph "The gallon container appears to use . . . "

Page 20, Paragraph 2 "The label states that this product is for professional use only, and may not be subject to the Hazardous Substance Act."

Paragraph 3 " . . . statements suggested by the Adhesives and Sealants Council . . . " (the suggestions were not law until May 1970)

" . . . this labeling requirement." (the suggestions were not law until May 1970)

Paragraph 4 "If this product contains . . . "

Paragraph 5 " . . . it may be injurious . . ."

Last Paragraph " . . . and is supposedly for use in . . ."
"Possibly this product may be used by . . ."

Page 21, Paragraph 1 " . . . the label does not include all that
suggested by the Adhesives and Sealants
Council . . ." (the suggestions were not
law until May 1970)

Paragraph 3 " . . . which may be irritating . . ."

Paragraph 4 " . . . may be printed in less than 6 point
type. Apparently, room could be found .

Last Paragraph " . . . information suggested by the Adhesives
& Sealants Council . . ." (the suggestions
were not law until May 1970)

Page 22, Paragraph 2 "If this solvent is present . . ."

Page 23, Carryover
Paragraph " . . . do not appear to be . . ."

2nd Last Paragraph " . . . fatality which was allegedly caused by.

1970 Report

Page 5, Paragraph 4 " . . . which may require special labeling . . .

Paragraph 6 " . . . memo dated 9/26/69 which recommended
cautionary labeling . . ."

Page 6, Paragraph 2 "One death from the use of this product has been
reported by Detroit District." (hearsay)

Paragraph 3 " . . . this product appears overlabeled . . ."

Paragraph 7 " . . . may require special labeling . . ."

Page 7, Paragraph 1 " . . . appears to be . . ."

Paragraph 6	"There did not <u>appear to be</u> . . ."
	" . . . does not <u>appear to be</u> of 6 point type."
Last Paragraph	" . . . does not <u>appear to be</u> of 18 point type size and the precautionary statements <u>appear to be</u> in less than 6 point type size."
Page 8, Paragraph 1	" . . . labels do not <u>appear to have</u> . . ."
Paragraph 3	"The signal word on the rear panel of the quart size <u>may not be</u> of 18 point type and the precautionary statements <u>appear to be</u> in smaller type than 6 points."
Paragraph 4	" . . . toluol <u>may be</u> present."
Last Paragraph	" . . . it <u>appears</u> the product should come under . . ."
Page 9, Paragraph 2	"This product <u>may</u> have undergone . . ."
Paragraph 4	"There <u>appears to be</u> an inconsistency . . ."
Last Paragraph	"The product does <u>appear</u> to require the special labeling . . ."
	"There is also <u>the possibility that</u> the can presented to the inspector during this inspection <u>may be</u> of an older label printing . . ."
Page 10, Paragraph 3	" . . . it <u>does not seem possible that</u> . . . and in addition the product <u>appears</u> to require . . ."
Last Paragraph	"It <u>appears</u> this product would require . . ."
Page 11, Paragraph 2	"If the flash point . . ."
Paragraph 5	"The product <u>appears to be</u> overlabeled. . ."
	" . . . <u>appears to be</u> . . ."
Page 12, Paragraph 1	" . . . <u>appears to be</u> . . ."
Paragraph 2	"The labeling <u>appeared to be</u> . . ."
Last Paragraph	"This product <u>may</u> contain . . ."
Page 13, Paragraph 1	" . . .this product <u>may</u> require . . ."

Paragraph 2 " . . . it may be possible that the product does not comply with the suggested statements . . . "

Page 14, Paragraph 1 " . . . statement of hazard appears to be . . .

Paragraph 2 " . . . the labeling appears to be . . . "

Paragraph 3 " . . . the product appeared to be . . . "

Paragraph 4 " . . . if the toluol is . . . "

Paragraph 5 "The label for this product appears to be . . .

Page 16, Paragraph 3 " . . . the death due to Mybond/80 which occurred in the Detroit District." (repetition of anonymous hearsay as an alleged fact)

Page 17,
Last Paragraph "Label comments on this firm's products appearing in this report were made prior to the finding that many of this firm's products may be exempt for portions of the label requirements under 191.63(a)(13)."

APPENDIX TO PART II

SPECIFICATIONS OF PORTIONS OF DOCUMENTS
WHICH CONTAIN PRIVILEGED, CONFIDENTIAL OR
TRADE SECRET INFORMATION OF P & S BARRED FROM DISCLOSURE

Portions of Establishment Inspection Report of
November 1969 Which Should Be Deleted and
Not Disclosed:

On Page 1 (FD Form 481): Items 10 thru 22 inclusive.

Items 13a and 19 set forth confidential financial information (P & S sales and earnings are publicly reported only on a consolidated basis with the sales and earnings of its parent corporation). The other items set forth information concerning P & S the nature of which cannot yet be ascertained by P & S and may involve privileged, confidential or trade secret information.

On Pages 4, 5 and 6: All information concerning the identity and nature of the raw materials used by P & S, i.e. the words beginning with caption "RAW MATERIALS:" on page 4 thru and including the last word on page 6.

On Page 7: All information involving the confidential and secret manufacturing processes of P & S, i.e. the words beginning with the caption "EQUIPMENT & PROCESSES:" thru and including the last word of the third succeeding paragraph.

On Pages 7 & 8: The sentence on page 7 reading "This product contains hexane, methyl ethyl keytone and toluene, according

to Mr. Henson", and the paragraph on pages 7 and 8 commencing with the words "A qualitative formula" on page 7 thru and including "Toluol" on line 7 of page 8; all such material being confidential trade secret formula.

On Pages 9 & 10: The words commencing with "contains" on the fourth last line of page 9 thru and including "(AMSCO)" on the third line of page 10; involves trade secret formulae.

On Page 11: In the third new paragraph the words "contains Hexane, Methyl Ethyl Keytone and Toluene, according to Mr. Henson"; involves trade secret formulae.

On Page 12: In the third paragraph the words commencing with "contains" thru and including the words "No. 4519 Solution"; involves trade secret formulae.

On Page 13: In the fourth paragraph the words commencing "contains" thru and including the words "(Shell)"; involves trade secret formulae.

On Page 14: In the fifth paragraph the words commencing "contains" thru and including "Anhydrous"; involves trade secret formulae.

On Page 15: In the ninth paragraph the words commencing with "contains" thru and including "Henson"; involves trade secret formulae.

On Page 16: In the bottom paragraphs the words commencing with "contains" thru and including "Octoate"; involves trade secret formulae.

On Page 17: In the next to last paragraph the words commencing with "contains" thru and including "Henson"; involves trade secret formulae.

On Page 18: In the second paragraph the last sentence beginning with the word "Both"; confidential formula information obtained from P & S employees.

On Page 18: In the bottom paragraphs the words commencing with "contains" thru and including "Ester"; involves trade secret formulae.

On Page 23: The entire paragraph commencing with the caption "MANUFACTURING CODES:"; relates to confidential manufacturing processes.

On Pages 24 & 25: All references to words containing customer names, i.e., the sentence on page 24 beginning with "Copies" and ending with "22" and the 8 entries numbered 15, 16, 17, 18, 19, 20, 21, and 22; relates to confidential customer lists and price data.

On Pages 8 (1st paragraph), 10 (2d paragraph), 11 (4th paragraph), 12 (5th paragraph), 13 (7th paragraph), 15 (1st paragraph),

16 (1st paragraph), 17 (2d paragraph), 18 (1st paragraph) and 19 (2d paragraph) to the extent to which these paragraphs contain references to the physical qualities of P & S products, such as flash point, viscosity and density, involving confidential technical information obtained directly or indirectly from data furnished by any P & S employee.

Parts of EIR Dated October 30, 1970 Which Should Be Deleted and Not Disclosed:

On the Endorsement (FD Form 481a): the 1st and 2nd sentences in the second paragraph; refers to P & S's internal management operations and relates to P & S's secret product formulae.

On Page 1 (FD Form 481): Items 10 thru 15 and 19 thru 25; items 13A and 19 contain confidential financial information of P & S and items 10-12, 14-15, 20-25 contain information respecting P & S the nature of which it has not yet been able to decipher but which may contain privileged or confidential information.

On Page 2: The 2nd, 3rd, 4th sentences of the 2nd paragraph; contain matters relating to trade secret formulae.

The 4th paragraph; relates to internal management operations.

The 2nd and 3rd sentences of the 6th paragraph relate to P & S's confidential financial information.

On Page 3: The two sentences beginning "It was management's" and "The informal meeting"; relate to P & S's negotiating position with FDA and to its internal management workings.

On Page 4: The 3rd sentence of the 1st paragraph relates to P & S's negotiations with FDA and to its internal management operations.

The 3rd, 4th and 5th paragraphs; relate to P & S's confidential production processes and operations.

On Page 5: The 1st sentence of the 2nd paragraph; relates to a trade secret formula.

In the 2nd paragraph, the 3rd sentence and a portion of the 5th sentence beginning "Mr. Henson" thru and including "whereas" and a portion of the 7th sentence beginning "in which" thru and including "and"; contain confidential technical data relating to P & S product.

The 3rd last paragraph; contains apparent reference to trade secret formula.

On Page 6: The last sentence in the 5th paragraph; relates to a trade secret formula.

In the 6th paragraph the words "The firm" thru and including "however" and the 3rd sentence; relate to a trade secret formula.

On Page 7: The 2d paragraph and in the 4th paragraph the words "The flash point" thru and including "however" in the 6th paragraph, the second sentence, and next to last paragraph; relate to confidential technical data.

On Page 8: The 4th paragraph, trade secret formula, in the 5th paragraph, the words "however" thru and including "centistokes" and the 2nd sentence in the 6th paragraph; relate to confidential technical product data.

On Page 9: The 2nd and 5th paragraphs; relate to secret product formula and technical data.

On Page 10: The 2nd sentence in the 1st paragraph, and the 3rd sentence in the 4th paragraph; relate to confidential technical product data.

On Page 11: The 2nd sentence of the 1st paragraph; relates to confidential technical product data.

On Pages 14 and 15: The last paragraph on page 14 and the 3rd and 4th paragraph on page 15; relate to products of third parties interested in this matter, the relationship of P & S with such third parties is inherently confidential.

On Page 16: The 1st paragraph; relates to confidential manufacturing processes.



U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

June 12, 1975

1036-15

Mr. William L. Rieth
Phillips, Lytle, Hitchcock, Blaine & Huber
3400 Marine Midland Center
Buffalo, New York 14203

Dear Mr. Rieth:

By letter of April 22, 1975, you were notified of a Freedom of Information request for two establishment inspection reports pertaining to the Pierce & Steven Chemical Corporation. By letter of May 5, 1975, to James Heffron of my staff, you submitted a claim of confidentiality on behalf of Pierce & Stevens over certain information contained in these reports.

Your first basis for objection to disclosure essentially relies on the 30-day comment period provided by section 6(b)(1) of the Consumer Product Safety Act (15 U.S.C. 2051). Inasmuch as more than 30 days have elapsed since you were given an opportunity to claim confidentiality, that basis for objection is no longer considered applicable to the subject release of information. With regard to your contention that disclosure is prohibited by the exemption provisions of 5 U.S.C. 552(b)(5), the Commission's policy is that intra-agency memoranda will be released whenever disclosure is not prohibited by law or is not against the public interest. In view of the foregoing, the disposition of your claim was made solely on the basis of the exemption provisions of 5 U.S.C. 552(b)(4), relating to trade secrets and confidential commercial or financial information. Only those portions of your claim which will not be honored as confidential are set forth below.

ESTABLISHMENT INSPECTION REPORT OF NOVEMBER 1969

Pages 4, 5, & 6 - Words beginning with the section captioned "Raw Materials" on page 4 and ending with the last word on page 6 will not be deleted.

EXHIBIT C

Mr. William L. Rieth
June 12, 1975
Page 2

Page 7 - The second and third paragraphs under the section captioned "Equipment & Processes" will not be deleted.

Information on pages 8, 10, 11, 12, 13, 15, 16, 17, 18, and 19 pertaining to physical qualities of Pierce & Steven products such as viscosity, flashpoint, and density will not be deleted.

ESTABLISHMENT INSPECTION REPORT OF OCTOBER 1970

Page 2 - The fourth paragraph under the section captioned "SUMMARY OF FINDINGS" will not be deleted. In the first paragraph under the section captioned "HISTORY OF BUSINESS" only the numerical sales figures and percentages will be deleted.

Page 3 - The two sentences beginning with "It was management's . . ." and "The informal meeting . . ." will be deleted.

Page 4 - The third sentence of the first paragraph will not be deleted. The last paragraph on the page will not be deleted.

Pages 5 - 11 - None of the information claimed will be deleted.

Page 15 - Only the name of the customer under the section captioned "Miracle-Glo" will be deleted.

For your convenience I am enclosing copies of the deleted versions of these reports which the Commission intends to release. Pursuant to part 1015.17(c) of the Commission's Freedom of Information Guidelines (39 F.R. 30298, August 21, 1974), the subject establishment inspection reports will not be released for 10 days from your receipt of this letter.

Sincerely,

Sadye Dunn

Sadye Dunn
Secretary

Attachments

June 24, 1975

Mr. Richard Simpson, Chairman
U. S. Consumer Product Safety
Commission
Washington, D. C. 20207

Re: Pierce & Stevens Chemical Corp.

Dear Chairman Simpson:

By letter received April 25 the Commission advised our client, Pierce & Stevens Chemical Corp. (P&S) of its rights to submit claims of confidentiality with respect to the release to the public of certain Food and Drug Administration reports made in 1969 and 1970. On May 5, 1975, we seasonably replied to the Commission raising three basic objections to the release of such reports:

(i) release would be improper because the documents were inextricably interwoven with inaccurate, misleading and supposititious information including highly prejudicial, anonymous hearsay statements;

(ii) much of the reports contained confidential trade secret information barred from release; and

(iii) the documents were pre-decisional, intra-agency memoranda protected from disclosure.

A copy of our May 5, 1975 letter is enclosed for your reference and study.

By letter received June 19, 1975, the office of the Secretary of the Commission advised that substantially all of the objectionable reports would be released within 10 days. In so doing the Commission apparently failed to even consider the basic "fairness" requirement of the statute that, "prior to its public disclosure", the Commission must "take reasonable steps to assure ... that such disclosure is fair in the circumstances and reasonably

Richard Simpson
Chairman

- 2 -

June 24, 1975

related to effectuating the purposes" of the Act. Our first objection had pointed out that elemental due process requirement of the statute which also imposes on the Commission the obligation to assure against the "public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product." Our first objection noted numerous specific inaccurate and misleading statements that unfairly reflected on the safety of P&S's products.

The Commission's reply indicated it gave no consideration to those many inaccuracies. Nor did it apparently even consider its obligation to assure against misleading public disclosure as to P&S's products. Instead, the Commission considered our first objection merely as essentially relying "on the 30-day comment period." By so doing the Commission ignored the entire thrust of our objection.

I strongly urge the Commission to now consider the merits of our objection to the release of any such misleading, unfair, inaccurate and supposititious information. While our enclosed letter cites many more illustrations, two examples will evidence the strong reasons for not releasing such reports.

The reports contain four anonymous hearsay references* to a death of an unnamed person allegedly caused by a P&S product. In fact, no such causal relationship has ever been demonstrated either to the Commission, to the FDA or to P&S. All such unfair references to such a death should be deleted from the report. Such deletions should be made because of the unfair prejudice that may be caused to P&S in any subsequent litigation where such report may possibly come into evidence.

Secondly, the reports also contain many references to possible mislabelling by P&S (many of which are referred to in the Appendix to Part I of our May 5 letter). An addendum to the 1970 report highlights the inaccuracy of the mislabelling comments, noting the finding that many of the products are apparently exempt from such labelling requirements. All references in the reports to alleged mislabelling should therefore be deleted.

I sincerely trust that a just appraisal of the various objections voiced in our May 5 letter will result in the Commission

*The references are in the 1969 endorsement, in the 1969 report at p. 2 and at p. 23, and in the 1970 report at p. 6)

Richard Simpson,
Chairman

- 3 -

June 24, 1975

recognizing its statutory duty to avoid the unfair release of inaccurate and misleading information as to P&S products.

Respectfully yours,

William L. Rieth

Bhl

cc: Sadye Dunn, Secretary
Mr. Henry E. Jones



U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

September 18, 1975

Mr. William L. Rieth
Phillips, Lythe, Hitchcock, Blaine & Huber
3400 Marine Center
Buffalo, New York 14203

Dear Mr. Reith:

This is in response to your letter of June 24, 1975, to Chairman Simpson concerning a Freedom of Information request for two Establishment Inspection reports pertaining to the Pierce & Stevens Chemical Corp. Your letter essentially raised two issues: (1) the finality of the Secretary's determination on a product manufacturer's claim that information is proprietary or inaccurate, and (2) the extent, if any, of the Commission's obligation to investigate alleged inaccuracies and make appropriate corrections prior to publicly releasing documents in response to a Freedom of Information request. Because these issues involve legal questions beyond the scope of this Office, your letter was referred to the Office of the General Counsel for legal advice. That advice was received yesterday and fully supports the following disposition of this matter. I regret the delay in making this response to you.

The Commission's Proposed and Interim Freedom of Information Guidelines (39 Federal Register 30298, August 21, 1974) do not provide for any appeal from the Secretary's determination on a manufacturer's claim that information is proprietary or inaccurate or that its release would be unfair. Accordingly, you may consider my previous determination by letter of June 12, 1975, to be a final administrative decision subject only to judicial review in a court of law. For your convenience I am enclosing copies of my June 12 letter and deleted

EXHIBIT E

Mr. William L. Rieth
Page 2

versions of the requested reports in the form in which they will be released. Pursuant to the provisions of section 1015.17(c) of the Proposed and Interim Freedom of Information Guidelines these reports will not be released for 10 days from your receipt of this letter.

Based on the advice of the General Counsel, it is my opinion that the Commission's obligation with respect to alleged inaccuracies in documents subject to the disclosure requirements of the Freedom of Information Act (5 U.S.C. 552 et. seq.) is satisfied by providing the affected manufacturer with an opportunity to submit a statement concerning alleged inaccuracies or unfair treatment. If such a statement is received by the Commission within the 10 day period provided by section 1015.17(c), it will be included in the Commission's response to the Freedom of Information requester.

Sincerely,



Sadye Dunn
Secretary

Enclosures

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PIERCE & STEVENS CHEMICAL CORP.,

Plaintiff,

vs.

U.S. CONSUMER PRODUCT SAFETY
COMMISSION,

Defendant.

CIV- 75 -410

ORDER TO SHOW CAUSE

Upon the Complaint filed herein and upon the annexed affidavit of William L. Rieth, Esq., and pursuant to Rule 65 of the Federal Rules of Civil Procedure, it is

ORDERED that on October ¹⁰~~14~~, 1975 at ^{12:00 noon}~~9:00 in the morning~~

or as soon thereafter as counsel can be heard, at the United States Courthouse in Buffalo, New York, defendant shall show cause why an Order should not be made granting a preliminary or permanent injunction against the disclosure by defendant of the following documents:

1. An Establishment Inspection Report ("EIR") of 25 pages, together with a one-page Endorsement dated November 26, 1969 relating to an inspection of plaintiff conducted on or about November 12 and 13, 1969 by the Food and Drug Administration ("FDA");

2. a two-page letter dated November 28, 1969 to plaintiff from Raymond L. Sweeney of the Buffalo District Office of FDA; and

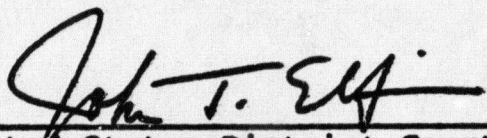
3. an EIR consisting of 17 pages, together with a one-page Endorsement dated December 3, 1970 relating to an FDA inspection of plaintiff conducted on or about October 20, 1970; and it is further

ORDERED, that defendant is restrained from disclosing *(other than one within defendant or one who is its attorney)* to any person, the above listed documents or any portion thereof, until further order of this Court. This Order is granted without prior written notice for the reason that it appears likely that, unless the defendant is so restrained, immediate and irreparable damage may result to plaintiff. Such likely injury and damage to plaintiff will consist, among other things, of defamation of plaintiff and its products and the subjection of plaintiff to needless and unfounded costly litigation, which injury and damages would be irreparable; and it is further

ORDERED, that service of this Order will be sufficient if made on or before October 2, 1975 by personally delivering a copy of this Order, with the Summons and Complaint, to the office of the United States Attorney for the Western District of New York and by mailing copies of this order and such summons and complaint

by certified mail to U. S. Consumer Product Safety Commission,
Washington D. C., 20207 and to the Attorney General of the United
States, Washington D.C.

Dated: October 2, 1975


United States District Court Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PIERCE & STEVENS CHEMICAL CORP.,

Plaintiff,

CIV - 75 - 410

vs.

AFFIDAVIT

U. S. CONSUMER PRODUCT SAFETY COMMISSION,

Defendant.

William L. Rieth, being duly sworn, deposes and says:

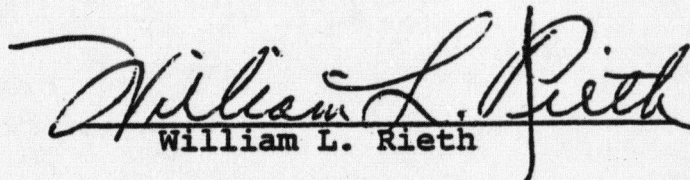
1. I am a member of the firm of Phillips, Lytle, Hitchcock, Blaine & Huber, attorneys for plaintiff herein.

2. By letter dated September 18, 1975 the defendant Commission indicated that the documents described in the annexed proposed Order to Show Cause would be publicly disclosed on or about October 3, 1975, a date 10 days after affiant's receipt on September 23, 1975 of that letter.

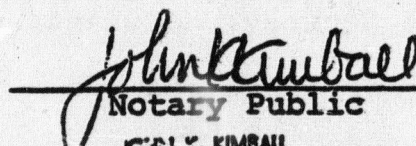
3. On information and belief, plaintiff will suffer immediate and irreparable injury if such disclosure is made because statements contained in such documents are misleading and inaccurate and highly prejudicial and defamatory of plaintiff and its products and may generate costly, needless and unfounded litigation against plaintiff. Such likely damage to plaintiff would not be averted either by the concurrent enclosure of explanatory material from the plaintiff nor by any subsequent retraction by the Commission. Nor could the injury and

defamation to plaintiff from any such disclosure be cured or remedied by any subsequent action of the Commission, of the plaintiff or of third persons.

4. Affiant certifies that written notice to defendant could not be given prior to the date hereof because of the lack of time to seek the requested relief by motion on notice. On October 1, 1975, affiant telephoned the defendant Commission and the office of the United States Attorney for the Western District of New York and orally advised each of them of plaintiff's intention to seek injunctive relief against such disclosure. A copy of the Summons, Complaint, Affidavit and proposed Order to Show Cause will have been given to said United States Attorney in advance of requesting such Order from the Court.


William L. Rieth

Sworn to before me this
2nd day of October, 1975


Notary Public
JOHN K. KIMBALL
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 22, 1976

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PIERCE & STEVENS CHEMICAL,	)	
CORP.,	)	
	)	
Plaintiff,	)	Civil Action No. 75-410
v.	)	
	)	
U.S. CONSUMER PRODUCT SAFETY	)	
COMMISSION,	)	
	)	
Defendant	)	

DEFENDANTS MOTION TO DISMISS
OR, IN THE ALTERNATIVE, FOR
SUMMARY JUDGMENT

Defendant, by and through its undersigned attorneys, hereby moves the Court to dismiss this action on the grounds that the Court is without jurisdiction over the subject matter, and plaintiff has failed to state a claim upon which relief might be granted, pursuant to Rules 12(b)(1) and (6), Federal Rules of Civil Procedure. Alternatively, defendant moves for Summary Judgment on the ground that there is no genuine issue as to any material fact, and defendant is entitled to judgment as a matter of law pursuant to Rule 56, Federal Rules of Civil Procedure.

In support of this Motion the Court is respectfully referred to the affidavit of Vincent Deluise, Freedom of Information Officer of the U.S. Consumer Product Safety Commission, and certified documents which are attached hereto and made a part hereof; and to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

OF COUNSEL:

MICHAEL A. BROWN
General Counsel

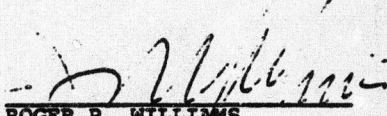
DAVID SCHMELTZER
Deputy General Counsel

REX E. LEF
REX E. LEF
Assistant Attorney General

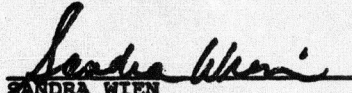
RICHARD J. ABCARA
RICHARD J. ABCARA
United States Attorney

RICHARD W. ALLEN
Assistant General Counsel

U.S. CONSUMER PRODUCT SAFETY
COMMISSION
1750 K Street, NW
Washington, D.C. 20207
(202) 634-7770


ROGER P. WILLIAMS
Assistant United States Attorney
502 U.S. Court House
Buffalo, New York 14202


JEFFREY AXELRAD


SANDRA WIEN

Attorneys for Defendants
Attorneys, Department of Justice
Washington, D.C. 20530
(202) 739-4268

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PIERCE & STEVENS CHEMICAL, CORP.,	)	
	)	
Plaintiff,	)	Civil Action No. 75-410
	)	
v.	)	
	)	
U.S. CONSUMER PRODUCT SAFETY COMMISSION,	)	
	)	
Defendants.	)	

AFFIDAVIT OF VINCENT DELUISE

Vincent DeLuise, being duly sworn, deposes and says:

1. I reside at 601 S. 21 St., Arlington, Virginia.

I am the Freedom of Information Officer for the Commission with the responsibility for implementing the Commission's administration of the Freedom of Information Act (5 U.S.C. 552 et. seq.).

2. I am familiar with the processing of a Freedom of Information Act request submitted by Ms. Adele Larson for any information in the Commission's files concerning a product called HY-BOND REDUCER manufactured by the Pierce & Stevens Chemical Corp. Mr. James Heffron, formerly a member of my staff, determined that two establishment inspection reports (EIRs) of the Pierce & Stevens Chemical Corp. prepared by personnel of the Food and Drug Administration in November, 1969 and October, 1970 were within the scope of Ms. Larson's request.

3. At the time Mr. William Rieth submitted a proprietary claim on behalf of Pierce & Stevens, it was my responsibility to review and make recommendations on such claims to the Secretary. In carrying out this responsibility it was my practice to solicit advice from the Commission's Office of the General Counsel and from technical staff where appropriate. In the

Pierce & Stevens case, I consulted with Edward Cull and Jeanette Wiltse of the Office of General Counsel and with Alfred Marozzi of the Commission's Bureau of Biomedical Sciences. I discussed with these individuals, among other things, whether or not such chemical properties as density, viscosity and flashpoint of a product would be entitled to confidential treatment as claimed by Pierce and Stevens. In their opinion, such chemical properties are not entitled to confidential treatment.

4. My specific recommendations to the Secretary of the Commission, Sadye Dunn, on the proprietary claims of Pierce and Stevens are as follows:

(a) For the EIR of November, 1969

(1) Honor its claim of confidentiality for items 10 through 22 on page 2 of form 481 contains financial information not publicly available.

(2) Deny its claim of confidentiality for the section entitled "Raw Materials" on pages 4 through 6 of the EIR because this section lists only 14 of several hundred chemicals used by Pierce & Stevens and there is no mention of percentages of the chemicals used in the formula for a specific product.

(3) Partially honor its claim of confidentiality for the section entitled "Equipment & Processes" on page 7 of the EIR. The first paragraph specifically describes Pierce & Stevens manufacturing process and should be kept confidential. The other paragraphs of this section do not contain any confidential manufacturing processes.

(4) Honor all claims of confidentiality for chemical formulas on pages 7 through 18 of the EIR. Chemical formulas not known within the industry and not easily arrived at are entitled to confidential treatment.

(5) Honor claims of confidentiality for manufacturing codes and customer names. These items are customarily accorded confidential treatment

(6) Deny claim of confidentiality for all references to the chemical properties of products, such as flashpoint, viscosity, density, in the EIR. This recommendation was based upon my conversation with Mr. Marozzi in our Bureau of Biomedical Sciences and on my knowledge as a former high school physical science teacher.

(b) For the EIR of October, 1970.

(1) Honor the claims of confidentiality for financial information and information relating to internal management operations on pages 1 and 2 of the EIR but, disclose the fourth paragraph which merely states that a labeling committee exists. Also, relating to business history, disclose the paragraph on p. 2 with the exception of any numerical figures therein.

(2) The remainder of Pierce and Stevens claims with two exceptions were not honored because the information was either already known or easily obtainable by anyone in the industry. The two exceptions are two sentences on page 3 which relate to internal management operations and the name of a customer on page 15.

5. It was not the practice of the Freedom of Information Officer to apply section 6(b)(1) of the CPSA (dealing with inaccuracies, etc.) to records requested under the Freedom

of Information Act because it was the opinion of the General Counsel's Office that Section 6(b)(1) was not applicable. Rather, Section 6(b)(1) was limited to such affirmative disclosures of information as a press release. When Pierce and Stevens claimed that its EIRs contained numerous instances of alleged inaccuracies, etc., I consulted with Mr. Cull and Ms. Wiltse in the Office of General Counsel about these claims. It was their opinion and my own that because the information was so dated; because some of the claimed inaccuracies were so minor (in some cases merely a question of linguistics); and because there was no reasonably conceivable way to verify some of the information by its very nature; that the best course of action would be to allow Pierce and Stevens to submit a company statement to the Commission that would be released with the EIRs, even though the Commission was not required to do so.

6. I also discussed with Mr. Cull and Ms. Wiltse the extremely serious administrative burden that would be placed upon my office and other sections of the Commission if every document requested under the Freedom of Information Act were subject to Section 6(b)(1). For instance, my office averages approximately 20 requests for documents a day. If the Commission were required to verify every fact in every document requested, it would be a serious financial drain on the resources of the Commission and would seriously impede the work of the Commission.

7. On October 6, 1975, the United States CPSC issued an opinion that section 6(b)(1) does not apply to FOIA requests.

A true and correct copy of that opinion is attached hereto
as Exhibit A.

Vincent Deluise
Vincent Deluise

Subscribed and sworn to me this 12th day of November,
1975.

James F. Berry
Notary Public

My Commission Expires: Aug 31, 1979
District of Columbia



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

CPSC EXECUTIVE SESSION
October 6, 1975

1750 K Street, N. W.
Washington, D. C.
9:30 am

Presiding: Chairman Simpson

Present : Commissioner Newman
Commissioner Kushner
Commissioner Franklin
Commissioner Pittle

ITEM

Application of Section 6(b)(1) of the Consumer Product Safety Act (15 U.S.C. 2055(b)(1)). (Briefing package, consisting of "Policy Statement on Public Disclosure of Information" transmitted by Commissioner Newman on August 18, 1975 and General Counsel's opinion transmitted to Commission on September 19, 1975.)

DECISION

Section 6(b)(1) applies, as a matter of law, only to affirmative Commission disclosures (e.g. press releases, press conferences, publications, speeches,) but not to disclosures made pursuant to Freedom of Information Act requests. As a matter of policy, however, the Commission may attempt to provide Section 6(b)(1) protections with regard to certain disclosure of information generated by Freedom of Information Act requests.

VOTE

Concurring in the above decision:

Chairman Simpson *R. Simpson*
Commissioner Franklin *B. Franklin*
Commissioner Kushner *J. Kushner*
Commissioner Pittle *R. David Pittle*

Dissenting:

Commissioner Newman* *C. Newman*

Submitted by: Commissioner Franklin
*Opinion to follow.

UNITED STATES GOVERNMENT

CONSUMER PRODUCT SAFETY COMMISSION

Memorandum

TO : Freedom of Information Office *fw* DATE: February 28, 1975
Attention: Vincent De Luise, Director

FROM : New York Area Office

SUBJECT: Attached letter dated 2/19/75 from Ms. Adele Larson
requesting release of information on a product "Hi-Bond Reducer"
manufactured by Pierce & Stevens, Inc., Buffalo, New York.

The attached letter was sent to our office requesting information on the 1 gallon can of the subject product. We have acknowledged the receipt of Ms. Larson's letter and notified her that we were forwarding her request to your office for appropriate processing.

Please respond.

Diane Debler
Diane Debler
Compliance Officer



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

3-17 Kitchen Floor
3-18 metal
CD 2:00

granted extension 3-18

CP 2:50

Dear Sir,

HI-BOND REDUCER, produced by Pierce & Stevens

I intend to bring a law suit against the manufacturer, but I am not able to locate a can of the product. I had purchased a 1 gallon can, which was blue and white. The retailer told me that it was the last can he had and that his wholesale supplier no longer carried the product. On his initiative, he informed Pierce and Stevens of the fire. I did extensive research in the Boston area but was not able to find another can like the one I had bought. My fire insurance agent was able, after months, to find a half gallon can which came in a red and white confection.

The manufacturer's address is: Pierce & Stevens, Box 1092,
Buffalo, New York 14240.

Thanks for your assistance.

Adele Larson

Adele Larson
100 Suffolk rd.
Newton, Mass. 02167
Tel. 617 - 734.0424

cc: Mr. P. Counihan

7/20 Nancy Johnston
searching

March 27, 1975

Ms. Adale Larson
100 Suffolk Road
Newton, Massachusetts 02167

Dear Ms. Larson:

This is to acknowledge receipt of your request of February 19, 1975 for copies of labels of HI-BOND REDUCER, a product of Pierce & Stevens Chemical Corporation.

In response to your request, I am sending copies of the labels from both one gallon and one pint containers of this product. I have been unable to locate any records of accidents associated with this product in Commission files.

I hope that this is sufficiently responsive to your request.

Sincerely,


James Heffron
Office of the Secretary

Enclosures
cc:

OS FOI File
OS Reading File
OS James Heffron

JHeffron: ydf: 3/27/75

U.S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

OFFICE RECEIVED
APR 9 11 52 AM '75
CONSUMER PRODUCT
SAFETY COMMISSION

April 3, 1975

Attention: Mr. James Zeffron

Dear Mr. Zeffron,

Thank you for your letter of March 27.

In addition with the information provided therein, I would appreciate knowing the following:

- Is the photocopy of the one gallon can off a blue and white can? Has Pierce and Stevens changed their one gallon confection in the last few years? If so, when? Does the labeling conform with US safety regulations? Is this product open to both wholesale and retail handling? Are there any restrictions on retail sale?

The retailer from whom I purchased the product said it was the last can he had. I asked him for the name of his supplier and he answered that the supplier no longer carried this product. Despite extensive research I have never been able to locate a one gallon can of the product.

In the fire I lost valuable property and suffered personal injury. I have therefore a very keen interest in knowing whether Pierce and Stevens is in compliance with US regulations.

I am looking forward to your answers and thank you in advance.

Yours sincerely,

Adelle Larson
Adelle Larson

Adelle Larson
100 Suffolk rd.
Newton, Mass 02167

JH

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Heffron file
April 23, 1975

Ms. Adele Larson
100 Suffolk Road
Newton, Massachusetts 02167

Dear Mr. Larson:

This is to acknowledge and respond to your letter of April 3, 1975 concerning Hybond Reducer Cleaner, a product of Pierce and Stevens Chemical Corporation.

The duplicate Hybond Reducer label that I sent you in my letter of March 27, 1975 was reproduced from black and white copy. I am therefore unable to tell you whether or not this label came from a blue and white Hybond container. In addition, I have been unable to determine whether there have been any restrictions on the wholesale or retail handling or sale of this product.

Inspections of the Pierce and Stevens establishment in Buffalo, New York in November, 1969 and October, 1970 revealed possible labeling deficiencies and an alteration in the formulation of Hybond Reducer Cleaner. Insofar as these reports may contain confidential commercial and/or trade secret information, the Commission is obliged to offer Pierce and Stevens an opportunity to claim confidentiality over any information contained in these reports. I am sending you a copy of my letter to Pierce and Stevens in this regard.

I will keep you advised as to the disposition of your request.

Sincerely,

James Heffron
Office of the Secretary

Enclosure
cc:
OS FOI File
OS Reading File
OS James Heffron
ydf: 4/23/75

Exhibit I

UNITED STATES GOVERNMENT

Memorandum

U.S. CONSUMER PRODUCT
SAFETY COMMISSION
WASHINGTON, D.C. 20207

TO : Sadye Dunn, Secretary
Thru : Michael A. Brown, General Counsel
FROM : Edward J. Cull, Office of the General Counsel

DATE: SEP 17 1975

SUBJECT: Recommended procedure for processing manufacturers' claims of alleged inaccuracies in Commission documents

Your memorandum of July 22, 1975, to Michael A. Brown has been referred to me for reply. In your memorandum you discuss the problems posed by Freedom of Information (FOI) requests for Establishment Inspection Reports (EIR's) of the Ted Hoyer and Co., Inc. and the Pierce and Stevens Chemical Corp.

In the Hoyer case, the company claims that the requested EIR of its plant is inaccurate in a number of respects. The investigator who conducted the plant inspection approximately six months ago was contacted and affirmed that to the best of his knowledge the statements in his report are accurate. Mr. Russell Williams of the Hoyer Company was so informed and given the opportunity to submit a written statement of any alleged inaccuracies which would be released with the EIR. Mr. Williams did not consider the release of the company's statement with the EIR a satisfactory solution.

In the Pierce and Stevens case, the company claimed that two EIR's of its plant conducted approximately six years ago contained numerous instances of misleading, erroneous, and speculative statements. After the Secretary informed Pierce and Stevens that the EIR's would not be withheld from disclosure on the basis of alleged inaccuracies, Pierce and Stevens in a letter dated June 24, 1975, requested the Chairman to hear its claim of inaccuracy on appeal.

Both the Hoyer case and the Pierce and Stevens case raise the issue of whether section 6(b) of the CPSCA is applicable to the Freedom of Information requests. This office is presently drafting a policy and procedures directive on the application of section 6(b). This directive, in essence, states that section 6(b) is not applicable to FOI requests.

Although the express provisions of section 6(b) do not apply to FOI requests, the Commission, nevertheless, should take reasonable steps to insure that any information which it releases to the public about a company is accurate and fair. The difficult part about applying the above principle is to determine in different situations what constitutes reasonable action on the part of the Commission to insure accuracy and fairness.

Obviously, it would be impracticable, if not impossible, for the Commission to insure that every statement about a company in every document released to the public is accurate and fair. The Hoyer and Pierce and Stevens cases are good examples of the difficulties involved in attempting to insure complete accuracy and fairness. In Hoyer, the company alleges, among other things, that the person who accompanied our inspector on his tour of the plant was Mr. Loren Brickham rather than Mr. Russell Williams. The only way to verify this assertion and the other statements made by Hoyer would be to conduct a re-examination of the plant. While this course of action might not be deemed too impracticable in a single case, the consequences of re-inspecting a company plant each time there is an allegation of an error in an EIR would be unduly burdensome on the resources and operations of the Commission. Presently, the Commission conducts over 5,000 plant inspections each year.

The problems posed by the Pierce and Stevens case are even more formidable. In this case, the company submitted a six-page document listing about 70 instances of inaccurate, misleading or speculative statements in the two EIR's and requested that they not be released. The two EIR's in question were made over six years ago so that in a number of instances, a re-inspection, if made, would not uncover the accuracy or inaccuracy of a statement.

Given the unreasonable burden a re-inspection would impose and the difficulty of verifying each and every fact in an EIR, especially those conducted several years ago, it would appear to be reasonable to resolve the questions of accuracy and fairness by following the course of action recommended in your memorandum, namely, releasing a company statement together with the disclosure of the EIR. This procedure of releasing a company's statement when there is a reasonable uncertainty over factual statements contained in a document prepared by Commission personnel goes beyond the requirements of section 6(b) of the CPUSA, House Interstate and Foreign Commerce Committee Report No. 92-1153 at page 32, which does not require the release of a manufacturer's explanation.

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With respect to Fierce and Steven's request for an appeal to Chairman, the recommendation in your memorandum that no appeal procedure be established is sound. This is in keeping with our FOI guidelines that do not permit a submitter of information to appeal the Secretary's determination. In addition, an appeal procedure would undermine the requirements of the FOIA for prompt disclosure of documents.

It should be noted that the documents in question here were prepared by Commission personnel. In the case of documents prepared by a manufacturer, it is not expected that an issue of inaccuracy or unfairness would normally arise because the documents would have been prepared by the manufacturer's own personnel.

cc:
V. DeLuise, OS
R. Abel, OFC

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THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PIERCE & STEVENS CHEMICAL,
CORP.,

Plaintiff,

v.

U.S. CONSUMER PRODUCT SAFETY
COMMISSION,

Defendant

Civil Action No. 75-410

DEFENDANTS OPPOSITION TO ORDER
TO SHOW CAUSE AND PLAINTIFF'S REQUEST
FOR PRELIMINARY INJUNCTION

Defendant, by and through its undersigned attorneys, opposes the Order to Show Cause and plaintiff's Request for a Preliminary Injunction on the grounds that plaintiff is not likely to prevail on the merits, plaintiff cannot show that it will be irreparably harmed, and the public interest requires that plaintiff be denied injunctive relief. In support of this Opposition, the Court is respectfully referred to defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment which is supported by the affidavit of Vincent Deluise, Freedom of Information Officer of the U.S. Consumer Product Safety Commission, and certified documents which are attached hereto and made a part hereof; and to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

OF COUNSEL:

MICHAEL A. BROWN
General Counsel

DAVID SCHEMELTZER
Deputy General Counsel

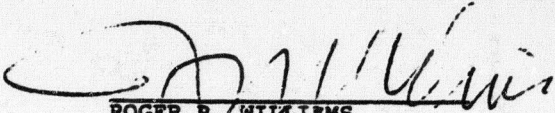
RICHARD ALLEN
Assistant General Counsel

REX E. LEE
REX E. LEE
Assistant Attorney General

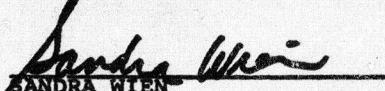
RICHARD J. ARCARA
RICHARD J. ARCARA
United States Attorney

(4)

U.S. CONSUMER PRODUCT SAFETY
COMMISSION
1750 K Street, NW
Washington, D.C. 20207
(202) 634-7770


ROGER P. WILLIAMS
Assistant U.S. Attorney
502 U.S. Courthouse
Buffalo, New York 14202


JEFFREY AXELRAD


SANDRA WIEN

Attorneys for Defendants
Attorneys, Department of Justice
Washington, D.C. 20530
(202) 739-4268

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DEC 23 1975

PIERCE & STEVENS CHEMICAL CORP.,

Plaintiff,

U.S. DISTRICT JUDGE
DISTRICT OF NEW YORK

Civ-75-410

vs.

U. S. CONSUMER PRODUCT SAFETY
COMMISSION,

Defendant.

Affidavit
Supporting Injunction

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:

ROBERT E. SHANAHAN, being duly sworn, deposes and says:

I am the Vice President-Distributor Marketing of Pierce & Stevens Chemical Corp. (P&S) where I have been employed for the past 12 years.

I am familiar with all the matters referred to in this affidavit of my own knowledge.

I have examined expurgated copies of the three documents relating to P&S (a 1969 FDA letter to P&S, a 1969 Establishment Inspection Report (EIR) and a 1970 EIR) which the Consumer Products Safety Commission (CPSC) proposes to release publicly: I have also examined the letters of Adele Larson to the CPSC about Hy Bond Reducer Cleaner (HBR) and the complaint filed on or about August 4, 1975 in the Massachusetts Superior Court by Adele Larson and Thomas N. Larson against P&S and others. The three CPSC documents, even after the expurgation proposed by the CPSC, contain various extensive references and comments concerning a number of

P&S products in addition to HBR. HBR is the only product referred to in Mrs. Larson's two letters to CPSC dated February 19, 1975 and April 3, 1975 and in her Massachusetts lawsuit.

The documents as presently expurgated by CPSC contain references and comments concerning at least 30 P&S products not referred to by Mrs. Larson. These products include:

- (1) Hy Bond/80 Multi Purpose Contact Adhesive (at pp. 1, 2, 7-9, 24 1969 EIR and pp. 5, 6, 16 1970 EIR).
- (2) Hy Bond Panel & Drywall Adhesive (at pp. 1, 11, 12, 24 1969 EIR and pp. 5, 7 1970 EIR).
- (3) Super Bond All Purpose Cement (at pp. 1, 22, 24 1969 EIR and pp. 11, 15 1970 EIR).
- (4) Super Bond Universal Reducer Cleaner (at pp. 1, 21, 22, 24 1969 EIR and p. 11 1970 EIR).
- (5) Fabulon Fast Dry Wood Floor Finish (at pp. 3, 12, 13, 24 1969 EIR and p. 7 1970 EIR).
- (6) Fabulon Floor Finish Reducer (at pp. 3, 13, 14 24 1969 EIR and p. 7 1970 EIR).
- (7) Pryme First Coater & Wood Lightener (at pp. 14, 15, 24 1969 EIR and p. 8 1970 EIR).
- (8) Fabulon Polyurethane Heavy Duty Clear (at pp. 15, 16, 24 1969 EIR and pp. 8, 9 1970 EIR).
- (9) Woodlore Self Rubbing Clear Satin Finish (at pp. 3, 16, 17, 24 1969 EIR and p. 9 1970 EIR).
- (10) Fabulon Epoxy Gum Finish Super Gloss Clear (at pp. 17, 18, 24 1969 EIR and p. 10 1970 EIR).
- (11) Fabuloy (at pp. 18, 20, 24 1969 EIR and p. 10 1970 EIR).
- (12) Hy Bond 30 Contact Adhesive (at pp. 20, 24 1969 EIR and p. 11 1970 EIR).
- (13) Super Bond All Purpose Sealant (at pp. 20, 21 1969 EIR).

- (14) Hy Bond Nonflammable Contact Adhesive (at pp. 22, 24 1969 EIR).
- (15) Approach Cleaner #P5360 (at pp. 22, 24 1969 EIR and p. 12 1970 EIR) Degreaser.
- (16) Approach Cleaner #P5497 (at pp. 22, 24 1969 EIR and p. 12 1970 EIR).
- (17) Fabulon Satin Lustre/Clear Oil Modified Polyurethane Heavy Duty Floor Finish (at p. 12 1970 EIR).
- (18) Fabulon Super Gloss Oil Modified Polyurethane Heavy Duty Floor Finish (at p. 12 1970 EIR).
- (19) Super Bond Pyroxylin Cement (at p. 12 1970 EIR).
- (20) Hy Bond/980 Carpet Cement-Latex Type Non-Flammable (at p. 13 1970 EIR).
- (21) Ball Mate Hardener (at p. 13 1970 EIR).
- (22) Break-In Approach Finish Additive (at p. 13 1970 EIR).
- (23) Keglite Lane Conditioner A-8942 (at p. 14 1970 EIR).
- (24) Thinner M-5200 (at p. 14 1970 EIR).
- (25) Lane Tamer All-Day Conditioner B-8354 (at p. 14 1970 EIR).
- (26) Lane Primer C-9551 (at p. 14 1970 EIR).
- (27) Lane Cleaner P-5258 (at p. 14 1970 EIR).
- (28) Gasket & Seal Contact Adhesive (at p. 14 1970 EIR).
- (29) Miracle-Glo (at p. 15 1970 EIR).
- (30) Satin-Smooth Wood Glow (at p. 15 1970 EIR).

Often the products referred to are in broad generic terms so that it is impossible to ascertain any particular product referred to. For example, the 1969 FDA letter apparently relates only to "adhesives" (HBR is not an adhesive); p. 2 of the 1969 EIR

refers to "wood and floor finish products" (HBR is not such a product); and numerous references (1969 letter, pp. 7, 23 1969 EIR) are simply made to "products." Only a very small portion of the three documents relate to HBR.

The three documents contain several references to the raw materials used in P&S's various products. Except to the extent the ingredients of HBR are listed on the label, P&S regards the product formulation and its ingredients as highly confidential matters which are not to be discussed outside the Company.

The three documents contain several tentative comments critical of one or more of P&S's products or their labels. If those comments became public as a result of CPSC action, P&S could suffer substantial and irreparable injury to its valuable trade names and good will. Competitive vendors have from time to time used such information about products to unfairly disparage their competitors' products. I understand that if such documents were released by the CPSC, no restrictions or protective order would prevent Mrs. Larson or her attorney from broadly disseminating the documents or threatening to do so in order to exert unfair influences on P&S to settle her lawsuit.

Robert E. Shanahan
Robert E. Shanahan

Subscribed and sworn to
before me this 10th day of
December, 1975

William L. Reith
Notary Public

NOTARY PUBLIC
STATE OF CALIFORNIA
My Commission Expires March 28, 1977

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PIERCE & STEVENS CHEMICAL CORP.

Plaintiff,

Civ. 75-410

-vs.-

MEMORANDUM

U. S. CONSUMER PRODUCT
SAFETY COMMISSION,

and

Defendant.

ORDER

Pierce & Stevens Chemical Corp. ("P & S") seeks a preliminary injunction to prevent the United States Consumer Product Safety Commission ("the CPSC") from disclosing pursuant to an alleged Freedom of Information Act ("FOIA") request two establishment inspection reports prepared in 1969 and 1970 by personnel associated with the United States Food and Drug Administration ("the FDA") and a letter dated November 28, 1969 to P & S from Raymond L. Sweeney of the FDA's Buffalo District Office now in the possession of CPSC.¹ P & S asserts that such documents contain false, inaccurate and misleading statements as well as confidential and trade secret information, and that disclosure would irreparably harm P & S by defaming its good name and products. P & S contends that disclosure would violate section 6(b)(1) of the Consumer Product Safety Act ("the Act"), 15 U.S.C. §2055(b)(1), and exemptions 3 and 4 of the FOIA, 5 U.S.C.

¹ Certain functions of the FDA were transferred to the CPSC by 15 U.S.C. §2079 after the documents in question were prepared.

§552(b)(3) and (4), in that the CPSC failed to take reasonable steps to assure the accuracy, fairness and propriety of disclosing the documents, disclosure would be grossly unfair and prejudicial to P & S under the circumstances and would not effectuate the purposes of the Act, and the CPSC has not excised all the confidential and trade secret information entitled to nondisclosure.²

The CPSC opposes the motion for preliminary relief and has moved pursuant to Fed.R.Civ.P. rule 12(b)(1) and (6) to dismiss the complaint or, in the alternative, for summary judgment, alleging that the complaint fails to state a claim upon which relief can be granted and that this Court lacks subject matter jurisdiction.

The instant action arises under both the Consumer Product Safety Act, which was passed by Congress to regulate commerce, and the FOIA. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1337. Kaiser Aluminum v. U.S. Consumer Product Safety Com'n, 414 F.Supp. 1047, 1059 (D.Del. 1976); GTE Sylvania, Inc. v. Consumer Product Safety Com'n, 404 F.Supp. 352, 366 (D.Del. 1975). In addition, the jurisdiction of this Court to entertain a suit seeking to enjoin the disclosure of documents pursuant to the FOIA can be premised upon 28 U.S.C. §1331. Westinghouse Elec. Corp.

2

Although P & S also asserts exemption from disclosure pursuant to 5 U.S.C. §552(b)(5), I do not view the documents in question as constituting interagency or intra-agency memoranda or letters so as to fit within such exemption.

v. Schlesinger, 542 F.2d 1190, 1209 (4th Cir. 1976), aff'g 392 F.Supp. 1246 (E.D.Va. 1974); Kaiser Aluminum v. U.S. Consumer Product Safety Com'n, supra, at 1053 (fn. 19). The allegations of irreparable harm in the instant complaint are sufficient to satisfy the required jurisdictional amount.

The CPSC does not enjoy the protection of sovereign immunity in actions seeking to enjoin the disclosure of documents pursuant to an alleged FOIA request or wherein it is alleged that disclosure by the CPSC would violate section 6(b)(1) of the Act. Westinghouse Elec. Corp. v. Schlesinger, supra, at 1214; Kaiser Aluminum v. U.S. Consumer Product Safety Com'n, supra; GTE Sylvania, Inc. v. Consumer Product Safety Com'n, supra; Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595, 599-600 (N.D.Ohio 1976); Hughes Aircraft Company v. Schlesinger, 384 F.Supp. 292, 294 (C.D.Cal. 1974).

Whether to grant preliminary relief falls decisionally within the discretion of the court. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). The issuance of a preliminary injunction, inherently an award of extraordinary relief, places a heavy burden upon the party seeking it to show clearly possibly irreparable injury and either probable success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in his favor. State of New York v. Nuclear Reg. Com'n, 550 F.2d 745, 750 (2d Cir. 1977);

Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1359 (2d Cir. 1976); Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973). Having considered the complaint, affidavits and memoranda of law in support of preliminary relief, the affidavits and memoranda of law in opposition thereto and oral arguments of counsel for both plaintiff and defendant, and applying the test for preliminary relief set forth above, and upon due deliberation, I find that plaintiff has satisfied its burden and that a preliminary injunction should issue restraining the disclosure of the documents in question pending a final resolution on the merits. See, Westinghouse Elec. Corp. v. Schlesinger, supra; GTE Sylvania, Inc. v. Consumer Product Safety Com'n, supra; but, see, Kaiser Aluminum v. U.S. Consumer Product Safety Com'n, supra.

P & S's allegations of irreparable harm are that disclosure of the documents allegedly containing inaccurate and misleading information³ and confidential and trade secrets would result in defamation of its corporate good will and would subject it to unfounded litigation. The latter claim of irreparable harm is clearly insufficient. The costs and expenses associated with litigation are not

³ The CPSC has conceded that portions of the reports may be inaccurate and has offered to include a statement by P & S asserting its viewpoint along with the documents disclosed by the CPSC. I am not convinced that inclusion of such statement with the disclosure of the documents would dispel the possibility of irreparable harm.

irreparable but can be compensated in damages. However, the defamation of P & S's good name and its products which would result from disclosure of allegedly highly inaccurate reports and the likely denigrating effects and economic repercussions to P & S in the market place from such inaccurate disclosure and the damage to P & S's competitive position which would result from the disclosure of confidential and trade secret information would be irreparable.

With the possibility of irreparable harm established, an examination into P & S's probability of success on the merits is in order. The CPSC argues that section 6(b)(1) of the Act is not applicable to the instant case because the information was not obtained in the first instance by the CPSC but, as noted previously, was originally gathered by the FDA. I find the transfer of these documents to CPSC from the FDA pursuant to section 30(e)(1)(A) of the Act, 15 U.S.C. §2079(e)(1)(A), to be sufficient to bring such documents within the ambit of section 6(b)(1) and to require the CPSC to undertake the mandated responsibilities set forth therein with respect to such documents prior to their disclosure. The CPSC next contends that section 6(b)(1) applies only to its "affirmative" disclosures of information, such as press releases, press conferences, speeches and publications, but not to disclosures made pursuant to FOIA requests. Such contention is not persuasive. I find no such dichotomy in

the statute or its legislative history. On the contrary, the duties placed on the CPSC by section 6(b)(1) apply to all disclosures of information except those specifically excepted therein.⁴

The CPSC submits that this Court should accord great deference to its decision of October 6, 1975 interpreting section 6(b)(1) as applying only to affirmative disclosures and not to those made pursuant to FOIA requests. Also, the CPSC strenuously points out that a heavy burden would be placed on its personnel were section 6(b)(1) to be held to apply to FOIA requests. I find the CPSC's interpretation of the applicability of section 6(b)(1) to be repugnant to the will of Congress and directly at odds with 5 U.S.C. §552(b)(3) which requires a governmental agency to consider upon receiving an FOIA request, in addition to the exemptions set forth specifically in the FOIA, whether any other statute exempts the requested material from disclosure. Section 552(b)(3) of Title 5 provides that the FOIA does not apply to matters that are

"(3) specifically exempted from disclosure by statute *** provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criterion for withholding or refers to particular types of matters to be withheld; ***." (Emphasis added.)

This direct reference to other statutes which establish particular criteria for withholding disclosure of information precludes the CPSC from deciding that the requirements of

⁴ Such exceptions are not pertinent to the case at hand.

section 6(b)(1) do not apply to FOIA requests. The decision in Westinghouse Elec. Corp. v. Schlesinger, supra, supports this conclusion. Therein, the United States Court of Appeals for the Fourth Circuit, at 1198-1199, interpreted the relationship between the FOIA and other statutes exempting disclosure as follows:

"*** The fact that a contrary statute will prevent the exercise of any discretionary authority in the agency to release exempt information follows because it is settled that the FOIA does not repeal directly or by implication any other statutes which may limit or restrict the disclosure of information by public officials, and those other statutes remain in full force and effect despite the enactment of the FOIA. Thus if there is some other statute or regulation which prohibits the disclosure of the exempt information, there is no agency discretion and 'the [government] agencies have no alternative but to follow the legislative mandate' or agency regulation and to deny disclosure. This follows because, whenever disclosure of the information in question would be violative of some other federal statute, both its exempt-character under the FOIA and its nondisclosability are thereby established. This conclusion results from the Act's own exemption of all matters that are 'specifically exempted from disclosure by statute,' and from the holding in FAA Administrator v. Robertson, supra, 422 U.S. at 265, 95 S.Ct. 2140, discussed later, that the FOIA does not repeal or modify any other statute which may restrict disclosure."

In FAA Administrator v. Robertson, 422 U.S. 255 (1975), the court held that 5 U.S.C. §552(b)(3) exempted the disclosure of certain documents because section 1104 of the Federal Aviation Act, 49 U.S.C. §1504, permitted the FAA Administrator to withhold disclosure of information in a report when in his judgment it would adversely affect the objecting party's interest and is not required to be disclosed in the public's

interest. This case establishes, contrary to the CPSC's contentions, that where other statutes condition disclosure on certain criteria a governmental agency is not free to disregard and ignore such a Congressional mandate in responding to FOIA requests. The court in GTE Sylvania, Inc. v. Consumer Product Safety Com'n, supra, at 369-370, relying on FAA Administrator v. Robertson, supra, quickly disposed of the CPSC's contention that section 6(b)(1) of the Act does not apply to FOIA requests:

"At the outset, the Court is confronted by the Commission's oblique suggestion that §2055(b)(1) may never apply where the information has been requested under the Freedom of Information Act, 5 U.S.C. §552. However, separate statutes regulating disclosure decisions of administrative agencies do have a significant and independent role. FAA v. Robertson, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 165 (1975).

* * * * *

"To argue that §2055(b)(1) becomes irrelevant during the pendency of a FOIA demand is to ignore a clear Congressional concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer. Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming but nevertheless imposed affirmative obligations on the Commission which cannot flippantly be avoided."

Thus, I conclude that section 6(b)(1) is a statute setting forth particular criteria for withholding information and applies pursuant to 5 U.S.C. §552(b)(3) to FOIA requests submitted to the CPSC.

The CPSC argues that, even if section 6(b)(1) applies to FOIA requests, it has complied with the procedural requirements

set forth therein by permitting P & S to object to the disclosure of the documents and that, once this has been done, disclosure is proper. I do not agree. Mere procedural compliance by giving P & S the opportunity to file its objections does not satisfy the CPSC's obligations under that section. The CPSC is mandated by Congress to assure the accuracy of the information being disclosed, the fairness of the disclosure under the circumstances and to determine whether disclosure effectuates the Act's purposes. The CPSC does not seriously contend that it has performed these substantive functions with respect to the documents at issue. Thus, P & S has met its burden to show a probability of success on the merits.

Without doubt, there are sufficiently serious questions going to the merits to make them a fair ground for litigation. In balancing the hardships, I find that the disclosure of allegedly false and misleading information and trade secrets would harm P & S to a decidedly greater extent than the results to the CPSC of nondisclosure. P & S's economic viability and competitive position would be endangered. On the other side of the scales, it is significant that the CPSC is not proposing to disclose the information to the public in general, but only to one individual who is only concerned with one of P & S's products. The public interest in disclosure is minimal as no public dissemination of information is involved. The proposed disclosure by the

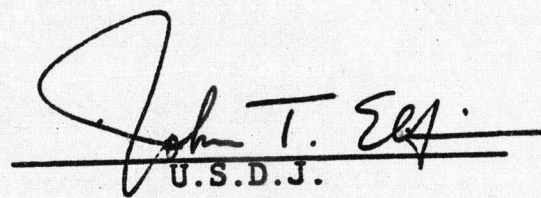
CPSC is not aimed at benefitting the consuming public and thus the results of enjoining such disclosure pendente lite do not outweigh the harm to P & S of immediate disclosure. Therefore, the scales tip decidedly in P & S's favor.

It is therefore hereby

ORDERED that CPSC's motion to dismiss or in the alternative for summary judgment is denied; and it is further

ORDERED that P & S's motion for a preliminary injunction is granted and the CPSC is enjoined from disclosing the three documents herein at issue.

Dated: Buffalo, N.Y.
October 26, 1977


U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PIERCE & STEVENS CHEMICAL CORP.)
a corporation,

Plaintiff

v.

THE UNITED STATES CONSUMER
PRODUCT SAFETY COMMISSION

Defendant.

Civil Action No.

75-410

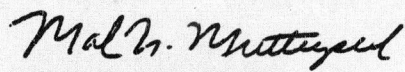
NOTICE OF APPEAL

Notice is hereby given that the United States Consumer Product Safety Commission hereby appeals to the United States Court of Appeals for the Second Circuit from the Order granting a preliminary injunction entered in this action on the 26th day of October, 1977.

RICHARD J. ARCARA
United States Attorney


THEODORE J. GARRISH
General Counsel
Consumer Product Safety Commission

DATED: Dec. 21, 1977


MARK N. MUTTERPERL
Department of Justice
Washington, D. C.

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GTE SYLVANIA INCORPORATED,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-104

RCA CORPORATION,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-108

THE MAGNAVOX COMPANY,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-112

ZENITH RADIO CORPORATION,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-113

RECEIVED
UNITED STATES ATTORNEY

DEC 17

DISTRICT OF DELAWARE

MOTOROLA, INC.,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-114

WARWICK ELECTRONICS, INC.,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-115

AERONUTRONIC FORD CORPORATION,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-116

ADMIRAL CORPORATION,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-131

GENERAL ELECTRIC COMPANY,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-136

MATSUSHITA ELECTRIC CORPORATION)
OF AMERICA,)

Plaintiff,)

v.)

CONSUMER PRODUCT SAFETY)
COMMISSION, et al.,)

Defendants.)

Civil Action No. 75-150

SHARP ELECTRONICS CORPORATION,)

Plaintiff,)

v.)

CONSUMER PRODUCT SAFETY)
COMMISSION, et al.,)

Defendants.)

Civil Action No. 75-151

TOSHIBA AMERICA, INC.,)

Plaintiff,)

v.)

CONSUMER PRODUCT SAFETY)
COMMISSION, et al.,)

Defendants.)

Civil Action No. 75-152

James M. Tunnell, Jr. and William H. Sudell, Jr. of Morris, Lichols, Arsht & Tunnell, Wilmington, Del., and Harry L. Shniderman, James M. McHaney, Jr. and Eugene C. Holloway of Covington & Burling, Washington, D.C. for plaintiffs GTE Sylvania Incorporated and Aeronutronic Ford Corp. (C. A. No. 75-104 and C. A. No. 75-116).

Richard J. Abrams of Richards, Layton & Finger, Wilmington, Del., and Stephen B. Clarkson of Sullivan, Beauregard, Clarkson, Moss & Brown, Washington, D.C. for plaintiff The Magnavox Company (C. A. No. 75-112).

Januar D. Bove, Jr. of Connolly, Bove & Lodge, Wilmington, Del., and Thomas J. Touhey of Sullivan, Beauregard, Clarkson, Moss & Brown, Washington, D.C. for plaintiff Zenith Radio Corporation (C. A. No. 75-113).

Charles S. Crompton, Jr. of Potter, Anderson & Corroon, Wilmington, Del., and Walter T. Kuhlmeier of Kirkland & Ellis, Chicago, Ill. for plaintiff Motorola, Inc. (C. A. No. 75-114).

Charles S. Crompton, Jr. of Potter, Anderson & Corroon, Wilmington, Del., and Nancy L. Buc of Weil, Gotshal & Manges, New York, N.Y. for plaintiff Matsushita Electric Corporation of America (C. A. No. 75-150).

Charles S. Crompton, Jr. of Potter, Anderson & Corroon, Wilmington, Del., and David Fleischer of Battle, Fowler, Lidstone, Jaffin, Pierce & Kheel, New York, N.Y. for plaintiff Toshiba America, Inc. (C. A. No. 75-152).

Charles S. Crompton, Jr. of Potter, Anderson & Corroon, Wilmington, Del., and Peter A. Dankin of Wender, Murase & White, New York, N.Y. for plaintiff Sharp Electronics Corp. (C. A. No. 75-151).

Andrew G. T. Moore II of Connolly, Bove & Lodge, Wilmington, Del. and Charles C. Hileman III, Ira P. Tiger, and Deena J. Schneider of Schnader, Harrison, Segal & Lewis, Philadelphia, Pa. for plaintiff RCA Corporation (C.A. No. 75-108).

Howard M. Berg of Berg & Sawyer, P.A., Wilmington, Del., and Michael A. Stiegel of Arnstein, Gluck, Weitzenfeld & Minow, Chicago, Ill. for plaintiff Warwick Electronics, Inc. (C. A. No. 75-115).

Henry N. Herndon, Jr. and Edward M. McNally of Morris, James, Hitchens & Williams, Wilmington, Del., and H. Woodruff Turner of Kirkpatrick, Lockhart, Johnson & Hutchison, Pittsburgh, Pa. for plaintiff Admiral Corp. (C. A. No. 75-131).

H. James Conaway, Jr. and Frederick W. Iobst of Young, Conaway, Stargatt & Taylor, Wilmington, Del., Robert W. Steele and Alan M. Grimaldi of Howrey & Simon, Washington, D.C. for plaintiff General Electric Company (C. A. No. 75-136).

James W. Garvin, Jr., United States Attorney and John H. McDonald, Assistant United States Attorney, Wilmington, Del., Barbara Allen Babcock, Assistant Attorney General, Sandra Wien Simon and Bruce Titus, Attorneys, Department of Justice, Washington, D.C., Theodore J. Garrick, General Counsel and Jeanette Wiltse and Edward J. Cull, Attorneys, Office of General Counsel, Consumer Product Safety Commission, Washington, D.C. for defendants.

O P I N I O N

Wilmington, Delaware
December 8, 1977.

Latchum
LATCHUM, Chief Judge.

On October 23, 1975, this Court made extensive findings of fact and conclusions of law when it granted plaintiffs'¹ motions to enjoin preliminarily the Consumer Product Safety Commission (the "Commission") from disclosing certain "TV-related accident data" submitted by the plaintiffs and a computer printout summarizing that data to the public in response to a request made under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *GTE Sylvania Inc. v. Consumer Product Safety Commission*, 404 F.Supp. 352 (D.Del. 1975). Because the prior opinion sets forth the factual background of this litigation in great detail, it will not be rehearsed here.

The Court based its decision to grant a preliminary injunction on the Commission's failure to comply with Section 6(b)(1) of the Consumer Product Safety Act (the "Act"), 15 U.S.C. § 2055 (b)(1). Section 6(b)(1) provides in pertinent part:

The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, [1] that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate,

-
1. Originally there were thirteen separate actions brought by as many television manufacturers which were consolidated for consideration of plaintiffs' motions for a preliminary injunction. Since the Court's opinion of October 23, 1975, the suit brought by Teledyne Mid-America Corp., C.A. No. 75-122, has been dismissed by stipulation of the parties. Docket Item 63 (all docket item references are to C.A. No. 75-104).

and [2] that such disclosure is fair in the circumstances and [3] reasonably related to effectuating the purposes of [the Act].

The Court found on the uncontested facts that the Commission had wholly failed to take reasonable steps to assure that any of the three prerequisites for public disclosure of the TV-related accident data were met. 404 F.Supp. at 370-73.

The consolidated cases are presently before the Court (1) on plaintiffs' motion for summary judgment to make the preliminary injunction permanent² and (2) on the Commission's motions to vacate the outstanding preliminary injunction and for summary judgment.³

Despite the two-year passage of time, the undisputed facts upon which the Court based its earlier decision have not changed. Thus, the Court need not reconsider any of its earlier findings and conclusions in order to take account of any intervening changes in the factual situation. However, the Commission does contend that there have been intervening changes of law which should prompt this Court to reconsider its previous decision. To these arguments we now turn.

I. COMMISSION'S INTERPRETATION OF SECTION 6(b)

First, in opposing the plaintiffs' motions for a preliminary injunction, the Commission suggested that Section 6(b)(1) applies only to affirmative disclosures initiated by the agency,

2. Docket Item 86.

3. Docket Items 79 & 80.

such as press releases and publications, and not to disclosures made in response to FOIA requests.⁴ The Court rejected such an interpretation of Section 6(b) because it contravened the legislative history of the section.⁵ Nevertheless, the Commission has renewed the argument, contending that two developments since the Court's previous decision support the Commission's position. The developments are: (1) the Commission formally endorsed the interpretation of Section 6(b)(1) which limits the section's applicability to "affirmative" disclosures initiated by the agency,⁶ and (2) Congress, in explaining a 1976 amendment to Section 29 of the Act (15 U.S.C. § 2078), used language which arguably indicates acceptance of the Commission's interpretation. After considering both these developments, however, the Court remains convinced that Congress did not intend to make Section 6(b) inapplicable in the face of an FOIA request.

4. See Docket Item 35, p. 14, n.4.

5. GTE Sylvania Inc. v. Consumer Product Safety Commission, supra, 404 F.Supp. at 369-70.

6. The Commission recorded its interpretation of Section 6(b) as a "minute" of an executive session held on October 6, 1975 (Docket Item 80, Ex.C.). Although that interpretation preceded the decision on the preliminary injunction motion by a few weeks, the Commission did not inform the Court of it at that time. In addition, the Commission recently published proposed procedures for complying with Section 6(b). 42 Fed.Reg. 54,304 (1977)(to be codified in 16 C.F.R. Part 1013). In the prefatory comments, the Commission reiterated its view that Section 6(b) applies only when it "actively and publicly discloses information." Id.

The Commission, relying on three Supreme Court cases,⁷ contends that its interpretation of Section 6(b) deserves great weight in this Court. Although the cases cited establish the principle that on matters of statutory construction a court should give deference "to the interpretation given the statute by the officers or agency charged with its administration,"⁸ they do not justify the application of that principle in this case. Two of them, *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965) and *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965), involved long-established administrative interpretations which the respective agencies had applied consistently and frequently.⁹ In sharp contrast, the interpretation being advanced by the Commission here did not arise until after the present controversy began. The third case cited by the Commission, *E.I. duPont de Nemours & Co. v. Collins*, ___ U.S. ___, ___, 97 S.Ct. 2229, 2234 (1977), is also distinguishable.

7. *E.I. duPont de Nemours & Co. v. Collins*, ___ U.S. ___, ___, 97 S.Ct. 2229, 2234 (1977); *Zemel v. Rusk*, 381 U.S. 1, 11 (1965); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

8. *Udall v. Tallman*, supra, 380 U.S. at 16.

9. In both cases, Congress knew about the administrative interpretations of the statutes in question but had not amended those statutes. The Court viewed such Congressional inaction as indicating approval of the agency's position. *Zemel v. Rusk*, supra, 381 U.S. at 11; *Udall v. Tallman*, supra, 380 U.S. at 17-18. It is noteworthy that since this Court rejected the Commission's interpretation in its prior decision, Congress has not amended Section 6(b), although that decision has been brought to Congress' attention and other sections of the Consumer Product Safety Act have been amended. See Consumer Product Safety Commission Improvements Act of 1976, Pub.L. No. 94-284, 90 Stat. 503; for instances where representatives of the Commission discussed this Court's prior decision before Congressional committees, see Docket Item 112, p. 24-25.

There, the Supreme Court held that the Fourth Circuit erred in substituting its judgment for that of the Securities Exchange Commission ("SEC") as to the appropriate method for determining value in a merger involving a closed end investment company. The Court noted that the SEC had "long recognized" the method it used, and that it was, "as Congress contemplated, the product of the agency's long and intimate familiarity with the investment company industry." Id. at ___, 97 S.Ct. at 2234. This case, on the other hand, presents a narrow legal issue which is readily susceptible to judicial resolution and requires no special expertise of the Commission. In sum, because none of the factors which warrant deference to an agency's position exist in this case, the Court will accord no special weight to the Commission's interpretation of Section 6(b)(1).

The second development which the Commission contends supports its interpretation of Section 6(b)(1) is a statement in the legislative history of a 1976 amendment to Section 29 of the Act.¹⁰ Section 29, 15 U.S.C. § 2078, concerns cooperation between the Commission and other federal and state agencies. The 1976 amendment authorizes the Commission to provide nonconfidential portions of accident and investigation reports to such agencies:

10. Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, §15, 90 Stat. 510 (amending 15 U.S.C. §2078 (Supp.III 1973)).

15 U.S.C. § 2078(e). The amendment further provides:

No Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section [6(b) of the Act]. Id.

The explanation of the amendment to Section 29 contained in the Conference Report includes the following statement:

The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees to supersede or conflict with the requirements of the [FOIA] (5 U.S.C. 552(a)(3) and (a)(6)). The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the [FOIA].

H.R. Rep. No. 1022, 94th Cong., 2d Sess. 27, reprinted in [1976] U.S. Code Cong. & Ad. News 1029 (emphasis supplied).

Although the statement of the Conference Committee appears consistent with the interpretation espoused by the Commission, it does not present a reliable basis for inferring that four years earlier, when Section 6(b) was enacted, Congress intended to make it inapplicable to disclosures made in response to FOIA requests. "[T]he views of a subsequent Congress form a hazardous basis for

inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960), quoted in *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963). Similarly, the impact of the Conference Committee's statement is diminished by the failure of Congress to amend Section 6(b) in 1976, when it presumably knew¹¹ of the prior decision in this case, in which the Court stated:

"To argue that [Section 6(b)(1)] becomes irrelevant during the pendency of a FOIA demand is to ignore a clear Congressional concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer. Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming but, nevertheless, imposed affirmative obligations on the Commission which cannot flippantly be avoided." *GTE Sylvania Inc. v. Consumer Product Safety Commission*, supra, 404 F.Supp. at 1370 (footnote omitted).

Finally, by stating that they did not intend the Section 29 requirement of compliance with Section 6(b) "to supersede or conflict with the requirements of the [FOIA] (5 U.S.C. 552(a)(3) and (a)(6))," the conferees emphasized the need for some sort of accommodation between the different time restraints imposed by Section 6(b) and the FOIA. Notably, the statement does not make Section 6(b) altogether inapplicable in the face of a FOIA request, as the Commission would do.

11. See note 9 supra.

The provisions of the FOIA cited by the conferees¹² impose a duty on federal agencies to respond within ten days in most cases, and promptly in any event, to FOIA requests. Section 6(b)(1) provides that at least thirty days prior to disclosing information from which the identity of a manufacturer can be readily ascertained the Commission must, "to the extent practicable, notify" such manufacturer and provide him "with a reasonable opportunity to submit comments to the Commission in regard to such information." 15 U.S.C. § 2055(b)(1). The Commission contends that an "impermissible conflict" exists between the thirty-day notice requirement of Section 6(b) and the ten-day time limit for responses under the FOIA.¹³ The Court disagrees, because in 1972 when Congress enacted the Consumer Product Safety Act, the FOIA required only that an

12. Subsection (a)(3) of 5 U.S.C. § 552 provides that each agency, upon request, shall make reasonably described records "promptly available" to the requester. Subsection (a)(6) requires an agency to determine within ten days (excepting Saturdays, Sundays and legal public holidays) after the receipt of a FOIA request whether to comply with the request and provides for a ten-day extension of that time limit in "unusual circumstances." Subsection (a)(6) further provides that a requester shall be deemed to have exhausted his administrative remedies if the agency fails to comply with the prescribed time limits. 5 U.S.C. § 552(a)(6)(C).

13. Docket Item 81, pp. 17-19.

agency make records "promptly available" to any person requesting them.¹⁴ The ten-day requirement was not introduced until 1974, when Congress amended the FOIA.¹⁵ Given that Section 6(b) has not been amended since 1972, the differences between the time periods specified in Section 6(b) and the FOIA cannot be used to infer a Congressional intent to limit the application of Section 6(b) to affirmative disclosures. Indeed, such an interpretation completely ignores the legislative history of Section 6(b). See *Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission*, ___ F.Supp. ___ (W.D.N.Y., filed October 26, 1977)(C.A. No. 75-410)(slip op.).

The Court concludes, therefore, that Section 6(b) applies to all disclosures which are not exempted from compliance by Section 6(b)(2), 15 U.S.C. § 2055(b)(2),¹⁶ and the Commission should attempt to accommodate the time periods of both statutes

14. Pub.L.No. 90-23,81 Stat. 54 (1967)(current version at 5 U.S.C. § 552(a)(6)).

15. Pub.L.No. 93-502, § 1(c), 88 Stat. 1562 (1974)(codified at 5 U.S.C. § 552(a)(6)).

16. The Commission contends that if Section 6(b)(1) applies in this case, it also must apply to thousands of other records, such as consumer complaints and petitions for rulemaking under Section 10 of the Act, 15 U.S.C. § 2059, which are regularly requested under the FOIA. Docket Item 81, pp. 18-19. The Court expresses no opinion on this proposition, except to note, without deciding, that petitions for rulemaking under Section 10 arguably are exempt from the requirements of Section 6(b)(1) as information concerning an administrative proceeding within the meaning of Section 6(b)(2)(B).

to the fullest extent practicable.¹⁷

II. AMENDMENT TO FOIA EXEMPTION 3

Next, the Commission argues that the Court should reconsider and reverse its prior holding that Section 6(b)(1) is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), because Congress amended that exemption in 1976 with the express intent of overruling the Supreme Court's ruling in *FAA v. Robertson*, 422 U.S. 255 (1975), upon which this Court relied in reaching its previous decision. Although the change in the law clearly necessitates reconsideration of the issue, the Court cannot agree with the defendants' position that Exemption 3, as amended, does not exempt material withheld pursuant to Section 6(b)(1).

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17. Cf. *Chrysler Corp. v. Schlesinger*, ___ F.2d ___, 14 E.P.D. ¶ 7868, at 6312 (C.A. 3, 1977). In the *Chrysler* case, a government agency notified Chrysler that it had received a request under the FOIA for certain documents concerning one of Chrysler's plants. The agency's regulations permitted a contractor to challenge a decision to disclose such information and guaranteed a final decision within thirty days from the date the challenge was filed. *Id.* at ___, 14 E.P.D. ¶ 7868, at 6304-05, 6314 n. 27. Due to the ten-day response time prescribed by the FOIA, the agency, upon deciding to release the information, informed Chrysler that it could not await the results of an administrative appeal and would release the information five working days later. *Id.* at ___, 14 Empl. Prac. Dec. ¶ 7868, at 6305. Chrysler filed suit in a district court to enjoin the disclosure and the Third Circuit held the case was ripe for judicial review despite Chrysler's failure to exhaust its administrative appeal remedy. *Id.* at ___, 14 Empl. Prac. Dec. ¶ 7868, at 6312. Contrary to the Commission's contention (Docket Item 111, p. 5), the Court in *Chrysler* did not "reject[] agency proceedings which would conflict with the mandate of the FOIA time requirements"; rather, the court resolved the conflict in a manner calculated to give effect to the purposes of both the FOIA and the administrative review procedures.

Originally, Exemption 3 of the FOIA provided:

(b) This section does not apply to matters that are —

* * *

(3) specifically exempted from disclosure by statute.

5 U.S.C. § 552(b)(3) (1970) (amended 1976). Congress amended this exemption in 1976 to exclude from the mandatory disclosure provisions of the FOIA, matters that are

(3) specifically exempted from disclosure by statute..., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.¹⁸

The Conference Committee, which was responsible for the language of the amendment as finally enacted, explained the purpose of the amendment as follows:

The conferees intend this language to overrule the decision of the Supreme Court in Administrator, FAA v. Robertson, 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U.S.C. 1306).¹⁹

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18. Pub.L.No. 94-409, § 5(b), 90 Stat. 1241 (1976). The amendment passed as a rider to the Government in the Sunshine Act. Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act, 76 Colum.L.Rev.1029, 1041 n. 70 (1976).
19. H.R.Rep.No. 1441, 94th Cong., 2d Sess. 14, reprinted in [1976] U.S. Code Cong. & Ad.News 2250 (Conference Report). The intent

(continued)

11.

The thrust of the defendants' argument is that Section 6(b)(1) is indistinguishable from the statute involved in FAA v. Robertson, supra. Because Congress expressed a clear intent to exclude Section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. § 1504) from Exemption 3, the Commission contends that Section 6(b)(1) of the Consumer Product Safety Act (15 U.S.C. § 2055(b)(1)) must be excluded from the exemption as well.

Section 1104 authorizes the Administrator, upon receipt of a written objection, to withhold information from public disclosure if, in his judgment, disclosure "would adversely affect the interests of [the objecting party] and is not required in the interest of the public." 49 U.S.C. § 1504. By holding that information withheld pursuant to Section 1104 constituted matter "specifically exempted from disclosure by statute" within the meaning of the original Exemption 3, the Supreme Court in FAA v. Robertson, supra, made it possible for government officials to avoid the mandatory disclosure provisions of the FOIA on general discretionary grounds such as "in the public interest."

(continued)

to undo FAA v. Robertson, supra, was also evident earlier in the legislative process. See H.R.Rep.No. 880, Part I, 94th Cong., 2d Sess. 9-10, reprinted in [1976] U.S. Code Cong. & Ad. News 2191-92; Note, supra note 18, 76 Colum.L.Rev. at 1042-44.

Congress reacted by amending Exemption 3 to prevent agencies from avoiding disclosure on such nebulous grounds.²⁰

After comparing the two statutes, the Court concludes that Section 6(b)(1) does not afford the Commission the same broad discretion to withhold information that Section 1104 gives to the Administrator of the FAA. Section 6(b)(1) requires the Commission, as a prerequisite to disclosing "information from which the identity of [a] manufacturer or private labeler may be readily ascertained," to "take reasonable steps to assure": (1) that the information is "accurate," (2) that the disclosure is "fair in the circumstances," and (3) that the disclosure is "reasonably related to effectuating the purposes of [the Act]." 15 U.S.C. § 2055(b)(1). The requirement of accuracy most clearly distinguishes Section 6(b)(1) from Section 1104 of the Federal Aviation Act, because "accuracy" is a more definite and objective standard than the "interest of the public." Similarly, the Court considers the fairness criteria in Section 6(b)(1) more susceptible to effective judicial review than the public interest standard of Section 1104.²¹

20. See Seymour v. Barabba, 559 F.2d 806, 807 (C.A.D.C. 1977).

21. See Note, supra note 18, 76 Colum.L.Rev. at 1045 & n.100.

Having found Section 6(b)(1) distinguishable from the statutes²² which Congress specifically stated would not be covered by Exemption 3, we now turn to the language of the exemption itself to determine whether Section 6(b)(1) falls within its ambit. The two provisos of Exemption 3 are in the disjunctive. Subpart A exempts from the FOIA matters that are "specifically exempted from disclosure by statute..., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." Because Section 6(b)(1) affords the Commission some discretion in determining whether to withhold material from the public, it is not the type of mandatory nondisclosure statute described in subpart A of Exemption 3. See Irons v. Gottschalk, 548 F.2d 992, 994 n.3 (C.A.D.C. 1976), petition for cert. filed, 46 U.S.L.W. 3055 (August 18, 1976)(No. 77-203). Subpart B exempts matters authorized to be withheld pursuant to one of two distinct types of statutes: (1) those which establish "particular criteria

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22. Besides Section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. § 1504), the Conference Report also identified Section 1106 of the Social Security Act (42 U.S.C. § 1306) as a statute whose terms do not bring it within Exemption 3. H.R.Rep.No. 1441, 94th Cong., 2d Sess. 14, reprinted in [1976] U.S. Code Cong. & Ad. News 2250 (Conference Report). Section 1106 of the Social Security Act prohibits disclosure of a wide range of social security information, except as the Secretary of HEW or the Secretary of Labor "may by regulations prescribe." 42 U.S.C. § 1306(a). Thus, Section 1306 vests virtually "unfettered and unguided power" in the Secretary to determine what information to disclose. Stretch v. Weinberger, 495 F.2d 639, 640 (C.A. 3, 1974). As indicated above, the Commission's discretion under Section 6(b)(1) is much more circumscribed.

for withholding" and (2) those which "refer[] to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); see Kruh v. General Services Administration, 421 F.Supp. 965, 967 n.4 (E.D.N.Y. 1976). The plaintiffs argue that Section 6(b)(1) satisfies both the standards contained in subpart B of Exemption 3. However, because the Court agrees that Section 6(b)(1) establishes particular criteria for withholding, it is unnecessary to decide whether the statute also refers to particular matters to be withheld.

The only guidance which Congress provided concerning the contours of the exemption for statutes establishing particular criteria for withholding is that it does not extend to statutes like the one at issue in FAA v. Robertson, supra. The few cases decided since the amendment became effective in March of 1977 have not shed much more light on the matter.²³

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23. In a case strikingly similar to this one, a district court judge held that Section 6(b)(1) of the Act "is a statute setting forth particular criteria for withholding information" and, therefore, falls within the ambit of FOIA Exemption 3. Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, ___ F.Supp. ___, ___ (W.D.N.Y., decided October 26, 1977) (C.A.No. 75-410) (slip op. at 8). In that case, however, the court relied on FAA v. Administrator, supra and this Court's prior decision without discussing the legislative history of the amendment to Exemption 3 and its effect on the continuing validity of those two precedents. Two other cases decided after the amendment to Exemption 3 became effective concerned Subpart A and the "particular types of matter" standard of Subpart B of the exemption, respectively. See Seymour v. Barabba, 559 F.2d 806 (C.A. D.C. 1977); Founding Church of Scientology v. National Security Agency, 434 F.Supp. 632 (D.D.C. 1977).

It is noteworthy, however, that the only commentator to address the issue has concluded that Section 6(b)(1) would fall within the amended Exemption 3, under the "particular criteria for withholding" rubric. Note, supra note 18, 76 Colum.L.Rev. at 1045 n.100. The legislative histories of Section 6(b)(1) and Exemption 3 support the same conclusion. As the Court stated in its prior decision in this case, Section 6(b)(1) reflects the balance struck between the Commission's need to have complete access to information relevant to its statutory responsibilities and Congress' "concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer." GTE Sylvania Inc. v. Consumer Product Safety Commission, supra, 404 F.Supp. 352; 370 & n.79. Due to the sensitive nature of much of the information the Consumer Product Safety Act authorized the Commission to gather, the House Committee on Interstate and Foreign Commerce reported that it had

written into section 6 [15 U.S.C. § 2055] of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this Act.

H.R.Rep.No. 1153, 92d Cong., 2d Sess. 31 (1972)(emphasis supplied). As the emphasized language makes clear, Congress intended Section 6(b)(1) to limit the discretion of the Commission to disclose information submitted to it.

A review of the legislative history of the original version of Exemption 3 led the Third Circuit "to a firm conviction that the absence of [legislatively prescribed] standards to govern broad agency discretion was the chief evil at which Congress aimed." *Stretch v. Weinberger*, 495 F.2d 639, 640-41 & n. 5 (C.A. 3, 1974). Nothing in the legislative history of the amendment to Exemption 3 suggests that the intent of Congress has changed.²⁴ Rather, the amendment overruled *FAA v. Robertson*, *supra*, in which the Supreme Court, according to Congress, had "misconceive[d] the intent of Exemption 3" by interpreting it to include a statute which granted an agency almost unlimited discretion to withhold documents. See H.R.Rep.No. 880, 94th Cong., 2d Sess., pt.1, at 23, reprinted in [1976] U.S. Code Cong. & Ad. News 2205; *Seymour v. Barabba*, *supra*, 559 F.2d at 807. Congress did not exclude from the amended Exemption 3 all statutes which give an agency some discretion concerning whether to disclose certain information. Therefore, the Court concludes that Section 6(b)(1), which requires the Commission to take reasonable steps to assure accuracy, fairness and a statutory purpose before disclosing information which identifies a manufacturer, establishes particular criteria for withholding and falls within Exemption 3 of the FOIA, as amended.

24. See generally Note, *supra* note 18, 76 Colum.L.Rev. at 1041-43. The author concluded that Congress intended to limit the exemption to statutes in which the concern for secrecy emanated from Congress rather than the agency. *Id.* He would assess the particularity of the criteria for withholding information according to their amenability to *de novo* judicial review, as provided for by the FOIA. *Id.* at 1045.

III. THIRD CIRCUIT'S DECISION IN CHRYSLER v. SCHLESINGER

The final legal development which the Commission contends should lead this Court to modify the findings and conclusions made in conjunction with the issuance of the preliminary injunction is the decision of the Third Circuit in Chrysler Corp. v. Schlesinger, ___ F.2d ___, 14 Empl. Prac. Dec. ¶ 7868 (C.A. 3, 1977). In Chrysler the court held that "the APA provides a cause of action for enjoining an agency from disclosing submitter-generated information," citing with approval the prior decision in this case. Id. at ___, 14 Empl. Prac. Dec. ¶ 7868, at 6311, 6318 n. 88.²⁵ In addition to recognizing a reverse FOIA cause of action, the Third Circuit suggested that in such cases the courts employ the following analytical approach in reviewing an agency's decision to disclose:

First it should inquire whether any non-disclosure statute or non-disclosure regulation is applicable. If so, the court must conclude that the agency has acted outside the scope of its statutory authority, and should enjoin disclosure. If no non-disclosure statute or regulation applies, the court must then determine under what authority the agency intends to disclose the contested information.

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25. In light of Chrysler Corp. v. Schlesinger, supra, the Commission has abandoned its argument that this Court lacks jurisdiction to review the decision to release the records at issue here. Docket Item 118, p. 5.

If the agency has concluded that the contested information does not fall within any FOIA exemption, thus mandating disclosure, the court must examine whether the agency applied the proper legal standards for the applicability of the FOIA exemptions. * * * Finally, if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the above analysis, the remedy is not a trial de novo, but a remand to the agency for an additional record or explanation for its decision.

Id. at ___, 14 Empl. Prac. Dec. ¶ 7868, at 6311-12 (footnote omitted).

In the case sub judice, the Commission concluded that the contested information did not fall within any FOIA exemption. Having already decided that, by virtue of Section 6(b)(1) of the Act, Exemption 3 applies to the accident data the Commission intends to disclose, the Court will bypass the first of the suggested inquiries — "whether any non-disclosure statute or non-disclosure regulation is applicable."²⁶ Instead, the Court turns to the Commission's alternative argument that, even if Exemption 3 applies, the Commission has complied with the requirements of Section 6(b)(1).

26. At oral argument, the plaintiffs argued that Sections 6(a)(2) and 6(b)(1) of the Consumer Product Safety Act (15 U.S.C. §§ 2055(a)(2) and (b)(1)) and 18 U.S.C. § 1905, which is incorporated in Section 6(a)(2), are "non-disclosure statutes" as that phrase was used in the Chrysler opinion. (Transcript ("T. ___") 17-19). The Commission disputed the characterization of Section 6(b)(1) as a "non-disclosure statute" and argued that the plaintiffs have not shown that the contested information is protected from disclosure by Section 6(a)(2) and 18 U.S.C. § 1905. (T. 30-31, 38-39). The Court expresses no opinion on these issues.

The decision to grant the plaintiffs' motions for a preliminary injunction was based on the finding that the Commission had not satisfied its duty under Section 6(b)(1) to take reasonable steps to assure (1) that the accident data is "accurate," (2) that disclosure would be "fair in the circumstances," and (3) that disclosure would be "reasonably related to effectuating the purposes of [the Act]." *GTE Sylvania Inc. v. Consumer Product Safety Commission*, supra, 404 F.Supp. at 370-373. The Court expressly held that the Commission's proposals (1) to release the accident data with a statement pointing out the differing qualities of recordkeeping among the manufacturers and (2) to correct any inaccuracies identified by the manufacturers were insufficient to satisfy the affirmative duties imposed by Section 6(b)(1). Id. at 371-72 & n. 81. Nevertheless, the Commission now argues that these steps, together with an offer to release with the data "statements prepared by the manufacturers describing how their subpoenaed data should be viewed," constitute compliance with the three criteria for disclosure.²⁷ Not wishing to repeat the analysis in its prior opinion, the Court notes only that the inclusion of such statements by the manufacturers will not facilitate meaningful comparisons of the accident data

27. Docket Item 81, p. 35. In *Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission*, supra, ____ F.Supp. at ____ (slip op. at 4 n. 3), the court concluded that the inclusion of a statement by the manufacturer asserting its viewpoint would not dispel the possibility of irreparable harm from disclosure of information like that at issue here.

to determine the relative safety of the various manufacturers' products. Much of the data will remain unverified. The inaccuracies and unfairness introduced by the Commission's failure to clarify ambiguities in the definition of "TV-related accident" in the subpoenas and to seek full compliance with its subpoenas will persist. In short, the Commission still has failed to demonstrate that disclosure is reasonably related to effectuating the purposes of the Act.²⁸ Accordingly, the Court finds that the Commission has not fulfilled its responsibilities under Section 6(b)(1).

The last step in the analytical framework set forth in *Chrysler Corp. v. Schlesinger*, supra, requires a remand to the agency, "if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the . . . analysis." Seizing upon this language, the Commission argues that a remand is appropriate here, because "the record is unclear, as to whether or not 6-b(1) was considered" in processing the request for the accident reports.²⁹ The Court disagrees.

28. The fact that the accident data could be compared profitably on the basis of the presence or absence of safety features or on the basis of type, such as black and white televisions versus color televisions, is irrelevant. The Commission could accomplish that purpose without identifying the manufacturers.

29. T. 30; Docket Item 118, p. 7.

As noted in the prior opinion,³⁰ the administrative record in this case supplemented by the affidavit of Constance B. Newman,³¹ Vice Chairman of the Commission, and the deposition of Robert L. Northedge,³² who was the project director of the Commission's investigation of television hazards, provides this Court with an adequate foundation for effective review. Moreover, the Court foresees no benefit which possibly could flow from a remand in the circumstances of this case.

30. GTE Sylvania Inc. v. Consumer Product Safety Commission, supra, 404 F.Supp. at 368-69 & n. 70.

31. Docket Item 27 (C.A. No. 75-112).

32. Based on the holding in Chrysler Corp. v. Schlesinger, supra, ___ F.2d at ___, 14 Empl. Prac. Dec. ¶ 7868, at 6311, that judicial review in reverse FOIA cases should be limited to the administrative record and should not involve a trial de novo, the Commission now contends that Court should not consider portions of the Northedge deposition. (T. 43). The argument is without merit. This Court's determinations in the prior opinion concerning the scope of judicial review and the materials to be reviewed comport completely with the principles expressed in the Chrysler case. Relying on Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971), and Camp v. Pitts, 411 U.S. 138, 142-43 (1973), the Court decided to supplement the administrative record with the Newman affidavit and Northedge deposition in order to understand the basis for the Commission's decision to disclose the accident data. GTE Sylvania Inc. v. Consumer Products Safety Commission, supra, 404 F.Supp. at 367-68. The Third Circuit explicitly recognized the propriety of such a procedure in the Chrysler opinion. ___ F.2d at ___, 14 Empl. Prac. Dec. ¶ 7868, at 6318 n. 96.

Mr. Northedge occupied a position of responsibility with respect to gathering and processing of the TV-related accident data. The Commission itself produced him as the person best able to explain the data gathering process. The Court concludes, therefore, that there is no reason to exclude the Northedge deposition. Moreover, the opinions expressed by Mr. Northedge concerning the misleading nature of the information and the absence of any use for it are merely cumulative, and do not form the basis for the Court's decision.

CONCLUSION

In conclusion, the Commission has presented no new facts which warrant modification of the findings of fact and conclusions of law made in conjunction with the issuance of the preliminary injunction. The Commission has referred to several changes in the law since the Court's prior decision, but none of these affect the validity of the previous conclusions. Specifically, the Court rejects the Commission's interpretation of Section 6(b)(1) as applying to "affirmative" agency disclosures, but not to disclosures made in response to FOIA requests. Where as in this case, an FOIA request is received for information from which the identity of a manufacturer can be readily ascertained and which is otherwise subject to Section 6(b)(1), the Commission must comply with Section 6(b)(1) before disclosing that information. Furthermore, if the Commission fails to take reasonable steps to assure that the information is accurate and that disclosure will be fair and serve a statutory purpose, the information will be exempt from disclosure under FOIA Exemption 3. The TV-related accident data at issue here is exempt from disclosure, because the Court finds that the Commission still has not complied with Section 6(b). Finally, the Court finds that the disclosure of this information in its present unverified state and in a manner which identifies the manufacturers would result in irreparable harm to the plaintiffs for the reasons set forth in the Court's previous opinion. 404 F.Supp. at 373-74.

Accordingly, the plaintiffs' motion for summary judgment will be granted and a permanent injunction against the public disclosure of the accident data and the computer printout will be entered.

This opinion shall constitute the findings of fact and conclusions of law required by Rule 52, F.R.Civ.P.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GTE SYLVANIA INCORPORATED,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-104

RCA CORPORATION,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-108

THE MAGNAVOX COMPANY,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-112

ZENITH RADIO CORPORATION,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-113

MOTOROLA, INC.,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-114

WARWICK ELECTRONICS, INC.,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-115

AERONUTRONIC FORD CORPORATION,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-116

ADMIRAL CORPORATION,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-131

GENERAL ELECTRIC COMPANY,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,

Defendants.

Civil Action No. 75-136

MATSUSHITA ELECTRIC CORPORATION)
OF AMERICA,)

Plaintiff,)
v.)

Civil Action No. 75-150

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,)

Defendants.)

SHARP ELECTRONICS CORPORATION,)

Plaintiff,)
v.)

Civil Action No. 75-151

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,)

Defendants.)

TOSHIBA AMERICA, INC.,)

Plaintiff,)
v.)

Civil Action No. 75-152

CONSUMER PRODUCT SAFETY
COMMISSION, et al.,)

Defendants.)

JUDGMENT AND PERMANENT
INJUNCTION

On the basis of findings of fact and conclusions of law set forth in the Court's opinion of October 23, 1975 (404 F. Supp. 352) and the Court's opinion of this date entered in these cases, it is

O R D E R E D

1. Summary judgment is hereby entered in favor of the plaintiffs and against the defendants.

1.

2. Defendants' motions to vacate the outstanding preliminary injunction and for summary judgment are denied.

3. The defendants Consumer Product Safety Commission ("Commission"), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;

(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in sub-paragraphs (a) and (b) above.

4. Provided, however, the Commission is not enjoined hereby from making certain limited disclosures to Underwriters Laboratories, Inc. ("UL"), the entity retained by the Commission to develop safety standards for television receivers under 15 U.S.C. § 2056, upon the following terms and conditions:

(a) UL and those assisting in development of safety standards for television receivers shall be permitted access to computerized summaries of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on 12 television manufacturers) in

a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

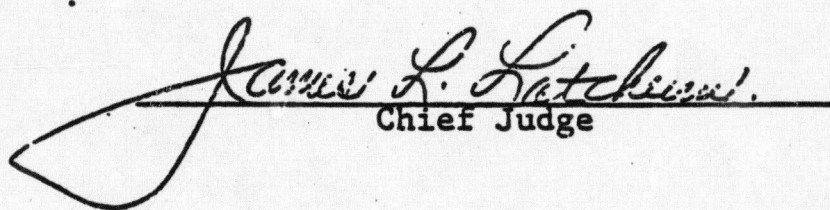
(b) For the sole purpose of developing safety standards for television receivers and not for public disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 12 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis.

5. Provided further, however, that the Commission is not enjoined hereby from public disclosure of the "Report on

Analysis of TV Accident Data to Consumer Product Safety Commission," dated April 25, 1975 by Robert A. Yereance (the "Yereance Report") so long as that Report or any accompanying information does not in any way, directly or indirectly, identify the manufacturers, model or chassis number of any television receivers alleged to have been involved in any "accidents" allegedly associated with any particular manufacturer, model or chassis.

6. Copies of this permanent injunction shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers forthwith.

Dated: December 8, 1977.


Chief Judge